

09:01AM

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CISCO SYSTEMS, INC.,) CV-14-5344
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.) AUGUST 4, 2016
)
ARISTA NETWORKS, INC.,) PAGES 1-98
)
DEFENDANT.)
)
)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BETH LABSON FREEMAN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: BY: KATHLEEN MARIE SULLIVAN
QUINN EMANUEL URQUHART AND SULLIVAN,
LLP
51 MADISON AVE, 22D FLOOR
NEW YORK, NY 10022

FOR THE DEFENDANT: ROBERT ADDY VAN NEST
RYAN WONG
DAVID SILBERT
BRIAN FERRALL
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SAN FRANCISCO, CA 94111-1809

APPEARANCES CONTINUED ON THE NEXT PAGE

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

1 FOR THE PLAINTIFF: SEAN SANG-CHUL PAK
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SAN JOSE, CALIFORNIA

AUGUST 4, 2016

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS
WERE HELD:)

THE COURT: ALL RIGHT. LET'S CALL OUR NEXT CASE.

THE CLERK: CALLING CASE 14-5344. CISCO SYSTEMS
VERSUS ARISTA NETWORKS.

COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCES.

MR. VAN NEST: GOOD MORNING, YOUR HONOR.

BOB VAN NEST FROM KECKER VAN NEST FOR DEFENDANT ARISTA.
AND I'M HERE WITH BRIAN FERRALL, DAVID SILBERT AND RYAN WONG.
AND WE HAVE A REPRESENTATIVE FROM ARISTA HERE, SEAN
CHRISTOFFERSON WHO IS SEATED IN THE FIRST ROW.

THE COURT: GOOD MORNING.

MS. SULLIVAN: GOOD MORNING, YOUR HONOR.

KATHLEEN SULLIVAN FROM QUINN EMANUEL APPEARING FOR THE
PLAINTIFF CISCO, TOGETHER WITH MY PARTNER SEAN PAK, AND MY
PARTNER JORDAN JAFFE. AND WE HAVE REPRESENTATIVES FROM CISCO
WITH US AS WELL.

THE COURT: AND WELCOME TO ALL OF YOU. AND I KNOW
MR. ALPER IS OTHERWISE ENGAGED OR ELSE HE WOULD BE HERE, RIGHT,
SINCE HE'S THE ONE RESPONSIBLE FOR ALL OF THIS.

WELL, LET ME -- I'M HOPING TO BE ABLE TO DO ACTUALLY A LOT
OF LISTENING TODAY TO WHAT EACH OF YOU SAY, BUT LET ME GIVE YOU
SOME OF MY THOUGHTS SO THAT YOU CAN ADDRESS THOSE, AND THEN I'M

09:43AM 1 HOPING THAT I CAN RESTRAIN MYSELF FROM INTERRUPTING YOU.

09:44AM 2 I FEEL IN READING THESE BRIEFS, THAT YOU ARE LITIGATING TWO
09:44AM 3 DIFFERENT CASES, AND I AM A LITTLE TROUBLED CONSIDERING HOW
09:44AM 4 CLOSE TO TRIAL WE ARE AND I'M GOING TO HAVE TO TRY ONE CASE AND
09:44AM 5 NOT TRY THEM IN STEREO.

09:44AM 6 IT PROBABLY HAS TO DO WITH THE ORDERING OF THE
09:44AM 7 DECISIONMAKING IN THE CASE AND WHETHER IT'S DECISIONMAKING BY
09:44AM 8 THE COURT OR BY THE JURY. SO I HAVE SOME CONCERNS ABOUT THAT.

09:44AM 9 THE OPENING BRIEF BY CISCO IS VERY STRAIGHTFORWARD AND
09:44AM 10 PROVIDES THE COURT WITH A, WHAT LOOKS LIKE A VERY CLEAR PATH TO
09:44AM 11 RULING IN YOUR FAVOR, BUT THAT GOT MUDDIED UP WITH THE
09:44AM 12 OPPOSITION WHICH PRESENTED AN ENTIRELY DIFFERENT FACE ON THE
09:44AM 13 ISSUES.

09:44AM 14 AND SO THAT WAS OF GREAT CONCERN TO ME. BUT IN TERMS OF
09:44AM 15 THE CISCO BRIEF, I HAD A COUPLE OF CONCERNS ABOUT IT THAT I
09:45AM 16 THINK YOU CAN PROBABLY CLARIFY.

09:45AM 17 ON THE ISSUE OF SUMMARY JUDGEMENT OF COPYRIGHTABILITY OF
09:45AM 18 WHAT YOU HAVE DEFINED AS THE CISCO CLI, THAT IS IT APPEARS TO
09:45AM 19 ME TO BE A REQUEST FOR WHAT IS REALLY JUST A THRESHOLD ISSUE IN
09:45AM 20 THE CASE AND THAT THE -- ALL OF THE ISSUES THAT MR. VAN NEST
09:45AM 21 SEEKS TO LITIGATE WOULD ESSENTIALLY BE PRESERVED EXCEPT FOR
09:45AM 22 THIS VERY HIGH LEVEL DETERMINATION OF THE CISCO CLI AS A WHOLE
09:45AM 23 HAVING, BEING ORIGINAL AND BEING VALID AND THAT THE
09:45AM 24 REGISTRATIONS ARE VALID.

09:45AM 25 AND SO I DON'T KNOW HOW MUCH IT GETS CISCO, I DON'T KNOW --

09:45AM 1 BUT I WANT TO MAKE SURE THAT IF I WERE TO GRANT THE MOTION AT
09:46AM 2 THAT HIGH LEVEL, THAT I KNOW EXACTLY WHAT I'VE DONE, AND I'M
09:46AM 3 NOT SURE ON THAT.

09:46AM 4 ON THE ISSUE OF COPYING, IN THE REPLY BRIEF YOU SUGGEST
09:46AM 5 THAT ARISTA MISUNDERSTOOD THE SCOPE OF WHAT YOU WERE
09:46AM 6 REQUESTING. AND I'M NOT SURE THAT THEY DID BECAUSE IN THE
09:46AM 7 REPLY YOU SUGGEST THAT YOU WERE NOT SEEKING A RULING ON
09:46AM 8 INFRINGEMENT. BUT IN YOUR PROPOSED ORDER, NUMBER TWO, YOU ASK
09:46AM 9 THE COURT TO SIGN AN ORDER, DEFENDANT ARISTA INFRINGED CISCO'S
09:46AM 10 COPYRIGHT BY COPYING CISCO'S CLI.

09:46AM 11 SO THAT'S A LITTLE -- I'M STRUGGLING WITH THAT BECAUSE I
09:46AM 12 WANT TO MAKE SURE THAT, FOR ME, THAT I ADDRESS THE QUESTION YOU
09:46AM 13 PRESENTED TO ME AND NOT SOME OTHER QUESTION. SO IT SEEMED TO
09:46AM 14 CHANGE A LITTLE BIT.

09:46AM 15 AND THEN ON THE ISSUE OF COPYING, IT WAS NOT CLEAR TO ME,
09:47AM 16 AND IF I MISSED IT, I APOLOGIZE, WHETHER YOU ARE ARGUING THAT
09:47AM 17 ARISTA HAS COPIED VERBATIM, CISCO'S CLI, OR WHETHER THE COPYING
09:47AM 18 WAS SUBSTANTIALLY SIMILAR.

09:47AM 19 AND IN THE REPLY BRIEF, AGAIN, I BELIEVE THAT YOU USED THE
09:47AM 20 WORD VERBATIM A FEW TIMES, AND IF THAT'S YOUR ARGUMENT, I AM
09:47AM 21 MORE INCLINED TO GRANT THE MOTION ON THE BEAR COPYING WHICH IS
09:47AM 22 NOT LIABILITY AT ALL, AS YOU POINT OUT, AND IT'S NOT
09:47AM 23 INFRINGEMENT.

09:47AM 24 BUT I NEED TO KNOW WHETHER YOU ARE SUGGESTING THAT IT IS
09:47AM 25 VERBATIM, BECAUSE VERBATIM IS SOMETHING I CAN DETERMINE AS TO

09:47AM 1 WHETHER IT'S DISPUTED OR NOT. BUT IF IT'S SUBSTANTIALLY
09:47AM 2 SIMILAR, I'M NOT -- THERE IS A PATH THROUGH THE CASE LAW, BUT I
09:47AM 3 THINK IT'S A DIFFERENT ANALYSIS.

09:48AM 4 AND SO THAT WAS A CONCERN THAT I HAD THERE AS WELL. I WILL
09:48AM 5 SAY ON THE FAIR USE THAT I THINK IT'S DISPUTED.

09:48AM 6 ON THE ARISTA MOTION, IT WASN'T CLEAR TO ME, MR. VAN NEST,
09:48AM 7 THAT YOU ARE ARGUING WHETHER ALL OF THE 26 COPYRIGHTS ARE
09:48AM 8 BEYOND THE FIVE-YEAR WINDOW OR JUST THE 26 THAT WOULD EMBODY
09:48AM 9 THE 198 COMMAND LINES THAT YOU ARE CHALLENGING IN YOUR MOTION
09:48AM 10 FOR SUMMARY ADJUDICATION.

09:48AM 11 BECAUSE YOU HAVE A PARAGRAPH ON, I BELIEVE IT'S PAGE 12 OF
09:48AM 12 YOUR BRIEF, SUGGESTED TO ME THAT YOU WERE CALLING INTO QUESTION
09:48AM 13 ALL OF THE REGISTRATIONS, IT WASN'T CLEAR. AND THE -- AND SO I
09:48AM 14 DO NEED SOME CLARITY ON THAT.

09:48AM 15 I HAVE TOO MANY NOTES HERE. I THINK THAT WAS MY BIGGEST
09:49AM 16 CONCERN. WHERE WE HAVE -- THE PATENT INFRINGEMENT, I'M LEANING
09:49AM 17 TOWARD GRANTING SUMMARY JUDGEMENT BASED UPON CISCO'S EXPERT'S
09:49AM 18 OPINION WHICH SEEMS TO MAKE CLEAR, AS ARGUED BY ARISTA, THAT
09:49AM 19 UNDER MY CONSTRUCTION, THAT THERE IS NO INFRINGEMENT OF THAT
09:49AM 20 CLAIM ELEMENT, HOWEVER. AND THEN YOUR APPEAL WILL BE BASED ON
09:49AM 21 MY CONSTRUCTION, OBVIOUSLY.

09:49AM 22 SO I THINK THAT'S ENOUGH FROM ME. BUT I WANT YOU TO
09:49AM 23 UNDERSTAND ONE OF MY BIGGEST CONCERNS IS WHAT HAPPENS IF I
09:49AM 24 GRANT YOUR MOTION, HOW DOES THAT AFFECT THE ULTIMATE ISSUES --
09:49AM 25 DETERMINATION OF LIABILITY IN THE CASE, BECAUSE I WAS A LITTLE

09:49AM 1 CONCERNED THAT WHAT CISCO ASKED FOR WAS DECEPTIVELY SIMPLE AND
09:49AM 2 THAT I MIGHT BUY MORE THAN WHAT I HAD BARGAINED FOR, SO I NEED
09:50AM 3 SOME ASSURANCE ON THAT, OF WHAT THE LIMITATIONS ARE.

09:50AM 4 LET ME START WITH CISCO. MS. SULLIVAN, MR. PAK, I'M
09:50AM 5 INTERESTED IN HEARING FROM YOU.

09:50AM 6 MS. SULLIVAN: THANK YOU, YOUR HONOR.

09:50AM 7 YOUR HONOR, WITH YOUR PERMISSION, I WOULD LIKE TO SHARE
09:50AM 8 WITH COUNSEL AND THE COURT AND THE COURT'S CLERKS, A BRIEF
09:50AM 9 POWERPOINT THAT WILL HAVE SOME OF THE EVIDENCE WE ARE GOING TO
09:50AM 10 DISCUSS, ESPECIALLY SINCE SOME OF IT IS CONFIDENTIAL AND UNDER
09:50AM 11 SEAL, SO I WOULD LIKE YOU TO HAVE IT IN FRONT OF YOU SO THAT I
09:50AM 12 CAN DIRECT YOU TO IT WITHOUT PROVIDING IT IN OPEN COURT.

09:50AM 13 THE COURT: THIS IS VERY HELPFUL.

09:50AM 14 MS. SULLIVAN: GOOD MORNING, YOUR HONOR.

09:50AM 15 AND THANK YOU VERY MUCH FOR GIVING US THE TIME TO ADDRESS
09:50AM 16 THESE IMPORTANT ISSUES.

09:50AM 17 I WOULD LIKE TO BEGIN WITH YOUR HONOR'S OVERARCHING
09:50AM 18 QUESTION ABOUT WHAT IS CISCO ASKING FOR IN OUR AFFIRMATIVE
09:50AM 19 MOTION AND WHAT WILL THAT LEAVE FOR TRIAL. BECAUSE I ASSURE
09:51AM 20 YOU WE HAVE NOT BEEN DECEPTIVELY SIMPLE. WE HAVE BEEN
09:51AM 21 STRAIGHTFORWARDLY SIMPLE IN WHAT WE ARE ASKING THE COURT TO DO;
09:51AM 22 AND THAT IS, WE ARE ASKING THE COURT TO SIMPLY DECIDE TODAY
09:51AM 23 THREE THINGS.

09:51AM 24 FIRST, THAT CISCO HAS A VALID COPYRIGHT IN ORIGINAL CLI
09:51AM 25 MATERIAL THAT IT OWNS, THAT THERE'S NO QUESTION ABOUT OWNERSHIP

09:51AM 1 OR ORIGINALITY. WE THINK THE EVIDENCE IS REALLY INCAPABLE OF
09:51AM 2 MEANINGFUL DISPUTE ON THAT ISSUE.

09:51AM 3 THE COURT: THIS IS AT THE HIGH LEVEL OF THE ENTIRE
09:51AM 4 BODY OF CISCO'S CLI, NOT AS TO ANY INDIVIDUAL ELEMENT.

09:51AM 5 MS. SULLIVAN: WELL, ACTUALLY YOUR HONOR, WE BELIEVE
09:51AM 6 WE HAVE ORIGINALITY. WE BELIEVE THERE'S NO DISPUTE OF FACT AS
09:51AM 7 TO ORIGINALITY AS TO BOTH THE HIGH LEVEL OF CLI AND AS TO THE
09:51AM 8 SIX COMPONENTS. AND I WILL WALK YOUR HONOR THROUGH THAT, BUT
09:51AM 9 LET ME JUST GO THROUGH THE ROAD MAP FIRST.

09:51AM 10 SO WE THINK ORIGINALITY AND OWNERSHIP CAN BE DECIDED AS A
09:52AM 11 MATTER OF LAW NOW BOTH TO THE OVERARCHING CLI AND ITS SIX
09:52AM 12 BUILDING BLOCKS WHICH I WILL DESCRIBE TO THE COURT IN A MINUTE.

09:52AM 13 THAT DOESN'T DECIDE ALL THE ISSUES ABOUT COPYRIGHT
09:52AM 14 INFRINGEMENT AND PROTECTABILITY THAT ARISTA MIGHT RAISE LATER
09:52AM 15 IN THE TRIAL, BUT IT DOES TAKE ORIGINALITY OUT OF THE CASE.

09:52AM 16 THE SECOND THING WE ASKED FOR IN A VERY STRAIGHTFORWARDLY
09:52AM 17 SIMPLE WAY IS EXACTLY WHAT YOUR HONOR DESCRIBED AS VERBATIM
09:52AM 18 COPY.

09:52AM 19 WHAT WE THINK YOU CAN DECIDE NOW, BECAUSE THIS IS AN
09:52AM 20 UNUSUAL CASE WHERE THERE'S DIRECT EVIDENCE OF VERBATIM COPYING,
09:52AM 21 IS THAT CISCO IS ENTITLED TO PARTIAL SUMMARY JUDGEMENT INsofar
09:52AM 22 AS THE COPYING ELEMENT OF COPYING INFRINGEMENT HAS BEEN
09:52AM 23 ESTABLISHED.

09:52AM 24 AND IT'S CRUCIAL HERE, YOUR HONOR, THAT AS YOUR HONOR JUST
09:52AM 25 SAID, THERE'S REALLY TWO ASPECTS TO COPYRIGHT INFRINGEMENT.

09:52AM 1 ONE IS, WAS THERE COPYING?

09:52AM 2 COPYING IS AN ESSENTIAL ELEMENT. IT HAS TO BE NOT A COSMIC
09:52AM 3 COINCIDENCE OR ACCIDENT THAT ARISTA'S CLI LOOKS IDENTICAL TO
09:53AM 4 OUR CLI.

09:53AM 5 SO WHAT WE ARE TRYING TO TAKE OUT OF THE CASE IS ANY
09:53AM 6 DISPUTE THAT ARISTA DELIBERATELY, INDEED BY ITS OWN TOUTING,
09:53AM 7 SLAVISHLY COPIED VERBATIM, OUR CLI.

09:53AM 8 AND THAT ARGUMENT, YOUR HONOR, GOES BOTH TO THE SIX
09:53AM 9 BUILDING BLOCKS, AND I WANT TO WALK YOUR HONOR THROUGH THOSE
09:53AM 10 AND I WANT TO SHOW YOU EXAMPLES OF THE VERBATIM COPYING, WE
09:53AM 11 THINK THAT GOES TO THE SIX BUILDING BLOCKS AS WELL AS THE
09:53AM 12 OVERARCHING USER EXPERIENCE THAT REPRESENTS THE TOTALITY OF THE
09:53AM 13 CLI.

09:53AM 14 SO YOUR HONOR, THOSE TWO ARE VERY NARROW ARGUMENTS, AND WE
09:53AM 15 ARE TRYING TO MAKE SURE WE ALL GET HOME IN TIME FOR THE
09:53AM 16 HOLIDAYS AT THE END OF THE TRIAL, AND WE THINK IF WE TAKE
09:53AM 17 UNNECESSARY DISPUTES OUT OF THE JURY, THAT WE WILL ALL BE MUCH
09:53AM 18 BETTER OFF.

09:53AM 19 SO WE THINK AS TO ORIGINALITY AND VERBATIM COPYING,
09:53AM 20 YOUR HONOR CAN DECIDE THOSE NOW WITHOUT FURTHER DISPUTE

09:53AM 21 THE COURT: SO I DIDN'T ACTUALLY READ YOUR OPENING
09:53AM 22 BRIEF AS ASKING FOR A DETERMINATION OF ORIGINALITY OF EACH OF
09:54AM 23 THE SIX BUILDING BLOCKS, BUT ONLY OF CISCO'S CLI AS A WHOLE.

09:54AM 24 THAT MADE THE FEIST CASE THAT I KNOW MR. PACK HAS PRESENTED
09:54AM 25 THAT TO ME SINCE THE VERY BEGINNING HERE, A VERY ATTRACTIVE

09:54AM 1 ROAD MAP FOR GRANTING THIS MOTION. BECAUSE THERE, BECAUSE IT
09:54AM 2 WAS A TELEPHONE BOOK, WE WERE DEALING WITH A COMPILATION OF
09:54AM 3 FACTS WHICH WERE NOT INDIVIDUALLY PROTECTABLE, BUT IN FACT THE
09:54AM 4 WORK AS A WHOLE WAS.

09:54AM 5 AND SO THAT, WHEN I READ YOUR BRIEF, I ACTUALLY THOUGHT
09:54AM 6 THAT YOU WERE ASKING FOR THE CISCO CLI AS A WHOLE TO BE
09:54AM 7 DETERMINED ON SUMMARY JUDGEMENT, SUMMARY ADJUDICATION.

09:54AM 8 YOU ARE NOW SUGGESTING THAT I WOULD DO THE LINE-BY-LINE
09:54AM 9 DETERMINATION OF ORIGINALITY, AND THEN I'M LOOKING AT THE --
09:54AM 10 BECAUSE MR. VAN NEST WOULD ARGUE THAT I NEED TO LOOK AT EACH OF
09:54AM 11 THEM, NOT JUST OUR COMMAND LINE ARE PROTECTABLE. AND THEN I
09:55AM 12 WOULD NEED TO LOOK AT THE HIERARCHIES AND THE MODES AND PROMPTS
09:55AM 13 AND THEN I WOULD HAVE TO LOOK AT HELPDESC AND OTHER FEATURES.

09:55AM 14 SO I GUESS I'M A LITTLE SURPRISED BECAUSE AGAIN, I ALWAYS
09:55AM 15 GO BACK TO THE PROPOSED ORDER SO THAT I LET YOU ARTICULATE THE
09:55AM 16 ISSUE. BUT YOU SAID CISCO OWNS A VALID COPYRIGHT IN CISCO'S
09:55AM 17 CLI WHICH IS COPYRIGHTABLE AS ORIGINAL TO CISCO.

09:55AM 18 NOW I LEFT OUT THE PARENTHETICAL DEFINITION OF WHAT IT IS.
09:55AM 19 BUT NOWHERE IN THERE DOES IT SAY AND EACH INDIVIDUAL PIECE,
09:55AM 20 SEPARATE FROM THE OTHERS.

09:55AM 21 MS. SULLIVAN: THAT'S CORRECT, YOUR HONOR.

09:55AM 22 YOUR HONOR, WE WOULD BE VERY HAPPY WITH A RULING NOW THAT
09:55AM 23 CISCO'S CLI AS A WHOLE IS ORIGINAL. AND WE THINK THAT YOU HAVE
09:55AM 24 AMPLE AUTHORITY UNDER, FOR EXAMPLE JOHNSON CONTROLS IS THE KEY
09:55AM 25 NINTH CIRCUIT CASE THAT SAYS THAT A COPYRIGHTED COMPUTER

09:55AM 1 PROGRAM PROTECTS NOT ONLY THE LITERAL SOURCE CODE, BUT ALL OF
09:55AM 2 THE STRUCTURES, SEQUENCE, ORGANIZATION AND USER INTERFACE THAT
09:56AM 3 IS PRODUCED BY THAT CODE.

09:56AM 4 SO YES, WE WOULD BE VERY HAPPY WITH A RULING NOW THAT
09:56AM 5 ORIGINALITY IS ESTABLISHED AS TO CLI. YOUR HONOR, WE NEVER
09:56AM 6 THOUGHT THIS CASE SHOULD BE FOUGHT AT THE LINE-BY-LINE LEVEL AT
09:56AM 7 THIS STAGE. ARISTA WILL BE ENTITLED AT TRIAL TO COME IN AND
09:56AM 8 SAY OH, WELL, ACTUALLY IN THAT LINE WE ADDED AN EXCLAMATION
09:56AM 9 POINT. SO IT'S THE MUSTACHE ON THE MONA LISA, IT'S NOT THE
09:56AM 10 IDENTICAL PAINTING.

09:56AM 11 THEY CAN DO THAT ON A LINE-BY-LINE OR PROMPT-BY-PROMPT OR
09:56AM 12 HIERARCHY BASIS LATER. BUT IF YOUR HONOR COULD RULE NOW THAT
09:56AM 13 ORIGINALITY HAS BEEN ESTABLISHED AS A MATTER OF LAW ON CLI AS A
09:56AM 14 WHOLE, WE THINK THAT WOULD BE VERY HELPFUL AT TRIAL.

09:56AM 15 THE COURT: ALL RIGHT.

09:56AM 16 NOW IT'S ALSO ARGUED BY ARISTA THAT WHAT YOU DEFINE AS
09:56AM 17 CISCO'S CLI, IS SOMETHING THAT IS AN ATTORNEY CONSTRUCT IS HOW
09:56AM 18 HE, I THINK, ARGUES IT. AND THAT IS TRUE TO A CERTAIN EXTENT,
09:56AM 19 IT MAY NOT COME FROM ATTORNEYS, IT MAY COME FROM YOUR CLIENTS,
09:57AM 20 BUT IN FACT WHAT YOU DEFINE AS CISCO CLI DOES NOT LIVE IN ANY
09:57AM 21 REGISTRATION AND EACH OF ITS ELEMENTS, I ACCEPT THAT EACH OF
09:57AM 22 THE ELEMENTS COMES FROM ONE OF THOSE REGISTRATIONS BECAUSE IT'S
09:57AM 23 NOT ARGUED OTHERWISE.

09:57AM 24 BUT IN FACT, YOU HAVE PULLED FROM THE UNIVERSE OF COPYRIGHT
09:57AM 25 REGISTRATIONS TO CREATE THIS -- TO IDENTIFY THE PROTECTION FOR

09:57AM 1 THIS INTERFACE.

09:57AM 2 MS. SULLIVAN: IF I COULD SLIGHTLY DISAGREE WITH
09:57AM 3 YOUR HONOR.

09:57AM 4 THE COURT: OKAY. PLEASE DO.

09:57AM 5 MS. SULLIVAN: WE DISAGREE THAT ANYTHING THAT WE HAVE
09:57AM 6 PRESENTED TO YOUR HONOR IS AN ATTORNEY OR AN EXPERT CONSTRUCT.

09:57AM 7 HIERARCHY, WHAT WE ARE ARGUING ABOUT IS PARTICULAR COMMAND
09:57AM 8 LINE EXPRESSIONS. I THINK OF THIS AS KIND OF AN EPISTOLARY
09:57AM 9 NOVEL BETWEEN THE ENGINEER AND THE SWITCH. THE ENGINEER WRITES
09:57AM 10 TO THE SWITCH, THE SWITCH WRITES BACK. THE CONTENT OF THOSE
09:57AM 11 LATER LETTERS BACK AND FORTH, THAT VERBAL EXPRESSION WHICH IS
09:57AM 12 THE HALLMARK OF A COMMAND LINE INTERFACE, THAT VERBAL
09:57AM 13 EXPRESSION IS NOT AN ATTORNEY CONSTRUCT. THE ARRANGEMENT AND
09:58AM 14 SEQUENCE OF IT IS NOT AN ATTORNEY CONSTRUCT. IT'S THE CODE
09:58AM 15 THAT'S REGISTERED THAT CREATES THAT.

09:58AM 16 SO AGAIN, JOHNSON CONTROLS IS VERY CLEAR THAT IN THE
09:58AM 17 NINTH CIRCUIT STRUCTURE, SEQUENCE AND ORGANIZATION, AND JOHNSON
09:58AM 18 CONTROLS USES THE TERM USER INTERFACE AS WELL, TO SAY THAT WHEN
09:58AM 19 THE CODE THAT'S REGISTERED GENERATES THE USER INTERFACE, THE
09:58AM 20 USER INTERFACE IS, ITSELF, PROTECTED BY THE REGISTRATION.

09:58AM 21 SO WE DISAGREE THAT ANYTHING HERE IS AN ATTORNEY CONSTRUCT.

09:58AM 22 YOUR HONOR, I WOULD LIKE TO ADDRESS YOUR SECOND POINT ABOUT
09:58AM 23 COPYING, AND THEN WE WILL GO BACK TO THE ROAD MAP. I WOULD
09:58AM 24 LIKE TO HUMBL Y APOLOGIZE TO THE COURT AND TO COUNSEL FOR A
09:58AM 25 SIMPLE INADVERTENT ERROR IN OUR PROPOSED ORDER.

09:58AM 1 IN OUR REPLY TO -- IN SUPPORT OF OUR OPPOSITION AT PAGE 3,
09:58AM 2 NOTE TWO, WE RESPECTFULLY SUGGEST THAT WHAT WE MEANT TO SAY IN
09:58AM 3 THE ORDER WAS WE WOULD LIKE YOU TO FIND -- SO IN THE TOP, AT
09:58AM 4 THREE, NOTE TWO --

09:59AM 5 THE COURT: I MISSED THAT.

09:59AM 6 MS. SULLIVAN: I'M SORRY, YOUR HONOR.

09:59AM 7 IT'S A REMINDER THAT THESE SOMETIMES SHOULD GO IN TEXT.
09:59AM 8 WHAT WE SAY HERE IS THAT INsofar AS THE PROPOSED ORDER STATED
09:59AM 9 INFRINGEMENT, THAT WAS NOT OUR INTENT, AND IT'S OBVIOUSLY NOT
09:59AM 10 SUPPORTED BY OUR PAPERS, WHICH YOUR HONOR CORRECTLY OBSERVED.

09:59AM 11 WHAT WE WOULD RESPECTFULLY ASK FOR IS A VERY SIMPLE
09:59AM 12 DECLARATION THAT WE HAVE ESTABLISHED THE COPYING ELEMENT OF
09:59AM 13 COPYING INFRINGEMENT.

09:59AM 14 SO NOW WHAT DOES THAT LEAVE FOR TRIAL, NOW YOUR HONOR
09:59AM 15 RESPECTFULLY WE ALSO THINK THIS IS NOT A FAIR USE CASE AND WE
09:59AM 16 THINK THERE ARE NO DISPUTED ISSUES OF FACT THAT COULD GO
09:59AM 17 LEGALLY TO SUPPORT A FINDING OF FEIST. AND WE WILL TALK ABOUT
09:59AM 18 THAT IF YOUR HONOR WISHES TO --

09:59AM 19 THE COURT: I DIDN'T MEAN TO TAKE YOU OFF TRACK
09:59AM 20 BECAUSE I DO WANT TO HEAR YOUR PRESENTATION.

09:59AM 21 MS. SULLIVAN: NO, YOUR HONOR.

09:59AM 22 I THINK YOU ARE ASKING THE MOST IMPORTANT QUESTIONS, SO I
09:59AM 23 WANT TO BE SURE TO BE RESPONSIVE. AND THAT IS WHAT ARE WE
09:59AM 24 TRYING TO TAKE OUT OF THE TRIAL AND WHAT ARE WE TRYING TO LEAVE
10:00AM 25 AS FAIR ISSUE FOR TRIAL.

1 SO WHAT WE ARE TRYING TO ESTABLISH NOW IS ORIGINALITY AND
2 OWNERSHIP OF THE CLI AS A WHOLE, AND THE FACT THAT ARISTA
3 COPIED OUR CLI. ARISTA VERBATIM COPIED OUR CLI, AND THAT WAY
4 WE DON'T HAVE TO HAVE THAT DEBATE IN THE FRONT OF THE JURY. WE
5 THINK FAIR USE CAN COME OUT TOO. WHAT WOULD BE LEFT FOR THE
6 TRIAL IS THE REST OF THE COPY NIGHT INFRINGEMENT CASE. AND
7 THAT WILL BE THE JURY WILL HAVE TO LOOK AT THIS COPIED FEDERAL
8 AND SAY, ARE THE PRINTABLE ELEMENTS OF CISCO'S CLI
9 SUBSTANTIALLY SIMILAR TO THE ELEMENTS IN ARISTA'S CLI. THAT'S
10 THE ULTIMATE DECISION FOR THE JURY.

11 AND WE ARE NOT TRYING TO DECIDE THAT NOW. THE JURY WILL,
12 AFTER YOUR HONOR INFORMS THE JURY ABOUT WHAT IS AND WHAT ISN'T
13 PROTECTABLE, AND YOUR HONOR WE AGREED TO THE EXCHANGE OF LEGAL
14 BRIEFS ON THE PROTECTABILITY ISSUE. ONCE YOU HAVE DONE THAT
15 ANALYTIC DISSECTION THAT THE NINTH CIRCUIT HAS REQUIRED THEN
16 YOU WILL BE ABLE TO TELL THE JURY, OKAY JURY, I HAVE TOLD YOU
17 THAT ARISTA COPIED, BUT JUST BECAUSE THEY COPIED DOESN'T MEAN
18 IT'S ACTIONABLE COPING.

19 TO FIND ACTIONABLE COPYING, YOU THE LADIES AND GENTLEMEN OF
20 THE JURY WILL HAVE TO DECIDE WHETHER ARISTA COPIED PROTECT
21 ANNUAL ELEMENTS OF OUR CLI IN SUCH A WAY TO SATISFY THE
22 EXTRINSIC AND INTRINSIC SIMILARITY TEST AND WHETHER THE LOOK
23 AND FEEL OF THEIR CLI IS THE SAME AS OUR CLI.

24 IF SOMEBODY SITTING DOWN AT AN ARISTA SWITCH, DOESN'T
25 NECESSARILY KNOW WHETHER HE'S AT A CISCO SWITCH OR AN ARISTA

10:01AM 1 SWITCH WHEN HE TYPES IN THOSE COMMANDS TO THE JURY, THAT
10:01AM 2 ULTIMATE ISSUE IS PRESERVED FOR THE JURY AND WE ARE NOT TRYING
10:01AM 3 TO DECIDE THAT TODAY.

10:01AM 4 THE SECOND THING THAT WILL BE LEFT FOR THE JURY OF COURSE
10:01AM 5 IS ANY REMAINING AFFIRMATIVE DEFENSES. ARISTA HAS PLEADED
10:01AM 6 MERGER AND SCÈNES À FAIRE AS WELL AS FAIR USE. WE THINK YOU
10:02AM 7 CAN DECIDE FAIR USE TODAY AND LEAVE THEM THEIR MERGER AND
10:02AM 8 SCÈNES À FAIRE DEFENSES FOR TRIAL.

10:02AM 9 AND OF COURSE THE ISSUE OF REMEDIES REMAINS. THE JURY WILL
10:02AM 10 DECIDE THE EXTENT OF THE HARM TO CISCO FOR OUR DAMAGES AND LOST
10:02AM 11 PROFITS CASE, AND YOUR HONOR WILL HAVE THE CHANCE POST-TRIAL TO
10:02AM 12 DECIDE THE ISSUE OF ANY INJUNCTIVE RELIEF.

10:02AM 13 SO YOUR HONOR, WHAT WE ARE REALLY TRYING TO DO HERE IS TO
10:02AM 14 ASSIST THE COURT AND THE JURY IN TAKING OUT THE ISSUES THAT
10:02AM 15 SHOULD NO LONGER REQUIRE A FACTUAL DISPUTE AND TO SIMPLY LEAVE
10:02AM 16 WHAT IS REALLY A SUBSTANTIAL, AN ALREADY SUBSTANTIAL TRIAL FOR
10:02AM 17 THE JURY ON THE ISSUE OF ACTIONABLE COPYING OR IMPROPER
10:02AM 18 MISAPPROPRIATION, THE SECOND ELEMENT OF COPYRIGHT INFRINGEMENT.
10:02AM 19 THEN AFFIRMATIVE DEFENSES AND REMEDIES.

10:02AM 20 DOES THAT CLARIFY THE SCOPE OF OUR MOTION, YOUR HONOR?

10:02AM 21 THE COURT: YES, IT DOES.

10:02AM 22 MS. SULLIVAN: OKAY. WITH THAT, YOUR HONOR, IF I CAN
10:02AM 23 KINDLY TURN TO WHAT WE PREPARED FOR YOU.

10:03AM 24 SHALL WE JUST DO THIS ON PAPER AND KEEP IT OFF THE SLIDES,
10:03AM 25 IF IT'S NEEDED.

10:03AM 1 THE COURT: THAT WAY I DON'T HAVE TO CLOSE THE
10:03AM 2 COURTROOM, IT SEEMS, BECAUSE YOU INDICATED SOME OF --

10:03AM 3 MS. SULLIVAN: YES, AND WE ARE NOT GOING TO USE THE
10:03AM 4 VISIBLE SCREENS. THERE ARE A FEW ANIMATIONS THAT MIGHT BE
10:03AM 5 HELPFUL THAT ARE PUBLIC.

10:03AM 6 THE COURT: LET ME JUST MOVE MY SCREEN SO THAT I CAN.

10:03AM 7 MS. SULLIVAN: WHAT I WILL ASK --

10:03AM 8 THE COURT: SO I CAN LOOK AT MY WITNESS AND THE
10:03AM 9 SCREEN.

10:03AM 10 MS. SULLIVAN: IS IT CONVENIENT FOR YOUR HONOR TO
10:03AM 11 HAVE THIS ON THE SCREEN? IF I CAN DIRECT YOU TO THE SLIDE
10:03AM 12 NUMBERS THREE.

10:03AM 13 THE COURT: BUT I WANT TO DO A CD ANIMATION BECAUSE
10:03AM 14 THEY ARE ALSO VERY HELPFUL.

10:03AM 15 MS. SULLIVAN: AND YOUR HONOR, WE WILL MAKE SURE NOT
10:03AM 16 TO PUT UP ANYTHING THAT'S GOT CDI, WE WILL DIRECT YOU TO THE
10:03AM 17 PAPER COPY FOR ANYTHING THAT'S CONFIDENTIAL.

10:03AM 18 IF I COULD DIRECT YOU TO SLIDE 3 WHICH DOES HAVE AN
10:03AM 19 ANIMATION.

10:04AM 20 MS. SULLIVAN: THANK YOU, YOUR HONOR.

10:04AM 21 SO THIS IS A VERY SIMPLE ANIMATION, JUST TO REMIND YOU.
10:04AM 22 YOUR HONOR HAS ASKED BEFORE, WHAT IS OUR CLI. AND OUR CLI IS
10:04AM 23 AN OVERALL USER EXPERIENCE, IT'S AN OVERALL COMMAND LINE
10:04AM 24 INTERFACE. BUT THE COMPONENTS ARE FIRST MULTI-WORD COMMAND
10:04AM 25 EXPRESSIONS.

10:04AM 1 AND WE ARE GOING TO SHOW YOU ABUNDANT EVIDENCE THAT THE
10:04AM 2 MULTI-WORD COMMAND EXPRESSIONS WERE ALL INVENTED AND CREATED
10:04AM 3 ORIGINALLY BY CISCO'S ENGINEERS.

10:04AM 4 THE SECOND IS SOMETHING THAT HAS BEEN REFERRED TO AS
10:04AM 5 HIERARCHIES. AND WE ARE NOT ASSERTING THE IDEA OF A HIERARCHY,
10:04AM 6 WE ARE ASSERTING THAT THE WAY THAT OUR MULTI-WORD COMMAND
10:04AM 7 EXPRESSIONS ARE COMPOSED IS WHEN YOU ENTER A FIRST TERM, YOU
10:04AM 8 WILL THEN HAVE A TREE OF CHOICES FOR WHAT THE SECOND TERM MIGHT
10:05AM 9 BE. AND THAT TREE MIGHT HAVE AN UNDERLYING TREE OF CHOICES.
10:05AM 10 BUT WHAT WE ARE ARGUING IS WHAT THE SPECIFIC WORDS IN THE
10:05AM 11 HIERARCHY ARE WHAT WE PROTECTED.

10:05AM 12 SIMPLE EXAMPLE, IF OUR FIRST WORD WAS KIDS, AND WE HAD, YOU
10:05AM 13 KNOW, ANDY, BOB AND CHARLIE, KIDS MIGHT BE THE FIRST WORD, THEN
10:05AM 14 WE COULD ADD, ANDY, BOB, OR CHARLIE. IF THE TREE ALLOWED US TO
10:05AM 15 HAVE GRAND KIDS, CHARLIE MIGHT HAVE GRAND KIDS, BOB MIGHT NOT.
10:05AM 16 BUT THE POINT IS NOT THAT WE ARE PROTECTING THE IDEA OF A
10:05AM 17 FAMILY TREE, WE ARE PROTECTING THE TREE THAT HAS ANDY, BOB AND
10:05AM 18 CHARLIE, AND THEN IT HAS CHARLIE'S KIDS DAVID, ED AND FRANK.
10:05AM 19 OKAY. SO WE ARE PROTECTING THE WORDS IN THE TREE AS THE
10:05AM 20 HEIRARCHY COMES UP.

10:05AM 21 THE THIRD THING THAT WE ARE ASSERTING IS PROTECTED IS
10:05AM 22 SOMETIMES CALLED A SCREEN OUTPUT OR A SCREEN DISPLAY OR A
10:05AM 23 COMMAND RESPONSE. IN THE PAPERS, I WANT TO BE CLEAR THAT THOSE
10:05AM 24 ARE SYNONYMS FOR THE SAME THING

10:05AM 25 THE COURT: OKAY.

10:05AM 1 MS. SULLIVAN: THAT'S THE LETTER THE COMPUTER SENDS
10:06AM 2 BACK IN OUR EPISTOLARY NOVEL. WHEN I HAVE SENT IT TO THE
10:06AM 3 COMMAND, IT SENDS ME BACK A COMMAND RESPONSE WHICH IS DISPLAYED
10:06AM 4 ON MY SCREEN, AND THAT'S A SCREEN OUTPUT.

10:06AM 5 THE FURTHER BUILDING BLOCK IS SOMETHING THAT'S CALLED HELP
10:06AM 6 DESCRIPTIONS. WHAT IF I FORGET WHAT PART OF THE NOVEL I'M
10:06AM 7 WRITING? I MIGHT WANT TO SAY, HOW DO I ASK ABOUT THE KIDS
10:06AM 8 AGAIN?

10:06AM 9 SO I MIGHT GO, KIDS, QUESTION MARK. AND THEN THE LETTER
10:06AM 10 COMING BACK TO ME IS GOING TO GIVE ME A HELP DESCRIPTION SAYING
10:06AM 11 FOR KIDS, YOU CAN ASK ABOUT ANDY, BOB AND CHARLIE BUT NOT ABOUT
10:06AM 12 THE GRAND KIDS, OKAY.

10:06AM 13 SO THE HELP DESCRIPTION TELLS ME WHAT, IT'S A SCREEN
10:06AM 14 OUTPUT, IT'S A SPECIALIZED KIND OF A SCREEN OUTPUT OR DISPLACE
10:06AM 15 THAT HAS SPECIFIC CONTENT.

10:06AM 16 MODES AND PROMPTS. OKAY. LET'S IMAGINE THAT IN THIS WORLD
10:06AM 17 WE DON'T WANT EVERY USER AT THE SCREEN TO NECESSARILY ALWAYS BE
10:06AM 18 ABLE TO SEE EVERYTHING IN THE NOVEL. WE MIGHT WANT TO HAVE
10:06AM 19 PARENTAL CONTROLS. WE MIGHT WANT TO HAVE ONE MODE IN WHICH WE
10:07AM 20 CAN SEE EVERYTHING. WE CAN SEE EVERYTHING ABOUT THE FAMILY,
10:07AM 21 GOOD, BAD AND UGLY. BUT WE MIGHT WANT TO HAVE ANOTHER MODE, A
10:07AM 22 KIND OF KID-FRIENDLY MODE IN WHICH YOU CAN SEE HAPPY THINGS
10:07AM 23 ABOUT THE FAMILY BUT NOT OTHER THINGS. IN OTHER WORDS, WE
10:07AM 24 MIGHT HAVE DIFFERENT MODES IN WHICH MORE OR LESS OF THE COMMAND
10:07AM 25 EXPRESSIONS ARE AVAILABLE. AND THE WAY WE KNOW WHICH MODE WE

10:07AM 1 ARE IN, IS WE HAVE A DIFFERENT PROMPT.

10:07AM 2 NOW, OBVIOUSLY WE DON'T OWN THE IDEAS OF A MODE OR A
10:07AM 3 PROMPT. WE DON'T OWN THOSE AS ABSTRACT IDEAS, BUT WE DO HAVE
10:07AM 4 ORIGINAL CREATIVE EXPRESSION IN SAYING, YOU KNOW, PARENT, HASH
10:07AM 5 TAG, OR KID FRIENDLY, ANGLE BRACKET.

10:07AM 6 I'M USING ANALOGIES HERE, OBVIOUSLY THAT'S NOT OUR MODES OR
10:07AM 7 PROMPTS, I'M TRYING TO SAY WE DO OWN THE COMBINATION OF THE
10:07AM 8 NAME OF THE MODE, THE PROMPT WE USE TO SIGNAL WE ARE IN IT,
10:08AM 9 THEN THE ASSOCIATED VERBAL EXPRESSIONS THAT CAN COME UP WHEN WE
10:08AM 10 ARE IN THAT MODE. ALL FAMILY PICTURES, SOME FAMILY PICTURES,
10:08AM 11 REPORT CARDS, FINANCES, WHATEVER THE THINGS THAT ARE ALLOWED TO
10:08AM 12 BE IN THAT MODE ARE ATTACHED BY OUR CODE TO THAT MODE OR
10:08AM 13 PROMPT.

10:08AM 14 WE ARE NOT TRYING TO PROTECT THE HASH TAG, YOUR HONOR, WE
10:08AM 15 ARE TRYING TO PROTECT WHICH WAY IN A MODE OUR PROMPT GETS TO
10:08AM 16 SPECIFIC VERBAL EXPRESSION.

10:08AM 17 THEN THE LAST BUILDING BLOCK, YOUR HONOR, IN SOME WAY THE
10:08AM 18 EASIEST AND FAMILIAR TECHNICAL DOCUMENTS, WHICH WE SOMETIMES
10:08AM 19 REFER TO IN THE PAPERS AS USER MANUALS OR TECHNICAL
10:08AM 20 DESCRIPTIONS, BUT THIS WOULD BE IF ANYONE EVER USED A BOOK
10:08AM 21 ANYMORE TO FIGURE OUT HOW TO DRIVE A CAR OR RUN A COMPUTER,
10:08AM 22 THERE ARE BOOKS AND THERE ARE PRINTOUTS THAT YOU CAN PRINT OUT
10:08AM 23 FROM ONLINE.

10:08AM 24 AND ARISTA, VERBATIM, COPIED MANY INSTANCES OF OUR
10:08AM 25 TECHNICAL DOCUMENTS AS ITS CEO HAS ADMITTED PUBLICLY.

1 SO YOUR HONOR, ALL OF THOSE COMPRISE THE CISCO CLI AS A
2 WHOLE. WE ARE NOT ASKING YOU NOW TO PARSE EVERY ONE OF THE SIX
3 BUILDING BLOCKS IN ORDER TO SAY THE WHOLE CLI IS ORIGINAL ON
4 PARTIAL SUMMARY JUDGEMENT. BUT I WANTED TO INTRODUCE YOU TO
5 THE TERMS, BECAUSE YOUR HONOR HAS ASKED WHAT IS HERE BESIDES
6 THE 508 COMMANDS.

7 NOW YOUR HONOR, JUST TO GIVE YOU A LIST, I'M TURNING NOW TO
8 SLIDE 4. WHEN WE GET TO THE QUESTION OF WHAT HAS ARISTA
9 INFRINGED, WE WILL BE ARGUING TO YOU, AS WE SET FORTH IN
10 DISCOVERY, THAT ARISTA HAS COPIED 508 COMMAND EXPRESSIONS, MORE
11 THAN 300 INSTANCES OF WHAT WE CALL THE COMMAND RESPONSES OR THE
12 SCREEN OUTPUTS OR THE SCREEN DISPLAYS, THAT'S THE LETTER THAT
13 COMES BACK TO ME WHEN I WRITE WITH MY COMMAND.

14 600 OF THE HELP DESCRIPTION OUTPUTS. HELPDESC SCREENS, THE
15 ONES THAT TELL YOU WHAT THE COMMAND MEANS, THAT'S A FORM OF
16 SCREEN OUTPUT THAT ANSWERS MY QUESTION. 11 COMMAND
17 HIERARCHIES, NINE MODES AND PROMPTS AND 2500-PLUS INSTANCES OF
18 THE TECHNICAL DOCUMENTS. BUT YOU DON'T NEED TO DO THAT NOW.

19 THE COURT: LET ME ASK A QUESTION.

20 IF I WERE TO FIND THAT THERE HAS BEEN VERBATIM COPYING, I
21 HAVE TO HAVE A LIST AS TO WHAT WAS COPIED AS OPPOSED TO A
22 GENERAL GENERIC STATEMENT.

23 IS THAT CONTAINED IN WHAT MR. VAN NEST SUMMARIZED IS
24 3,000 PAGES OF SUBMITTALS? OBVIOUSLY THIS IS A QUANTIFICATION
25 OF WHAT WAS COPIED, BUT THERE ARE 508 SPECIFIC COMMAND

10:10AM 1 EXPRESSIONS. THOSE ARE ATTACHED TO AN APPENDIX IN YOUR
10:10AM 2 COMPLAINT ACTUALLY.

10:10AM 3 MS. SULLIVAN: THAT'S RIGHT, YOUR HONOR.

10:10AM 4 THE COURT: BUT THE OTHERS I CAN'T BELIEVE ARE
10:10AM 5 SPECIFICALLY IDENTIFIED, AND I THINK I WOULD IN AN ORDER, NEED
10:10AM 6 TO SPECIFY WHAT WAS COPIED SO THAT IT CAN'T CHANGE.

10:10AM 7 MS. SULLIVAN: YES, YOUR HONOR.

10:11AM 8 WELL, YOU HAVE TWO OPTIONS, YOUR HONOR. WE THINK YOU CAN
10:11AM 9 SPECIFY AS TO THE COMMAND EXPRESSIONS THAT WERE IN THE EXHIBIT
10:11AM 10 ATTACHED TO THE COMPLAINT. AND THOSE ARE GOING TO BE VERBATIM
10:11AM 11 COPIED.

10:11AM 12 AS TO THE OTHERS, YOU COULD ALSO ISSUE AN ORDER NOW THAT
10:11AM 13 SAYS, I FIND THAT ARISTA COPIED, TO THE EXTENT THAT ANY OF
10:11AM 14 THESE ARE VERBATIM COPIES, AND YOU CAN SIMPLY WAIT FOR THE
10:11AM 15 TRIAL FOR THE JURY TO MAKE THAT COMPARISON.

10:11AM 16 SO IN OTHER WORDS, YOU WOULD BE DECIDING NOW ON THE
10:11AM 17 PRINCIPLE, THAT VERBATIM COPYING AS TO THESE ITEMS, IT
10:11AM 18 SATISFIES THE COPYING ELEMENT.

10:11AM 19 AND REMEMBER, YOUR HONOR, ALL YOU ARE DECIDING IS IT'S NOT
10:11AM 20 COINCIDENCE, IT'S, YOU COULD SIMPLY SAY, I FIND THAT THE 508 OR
10:11AM 21 506 MULTI-WORD COMMAND EXPRESSIONS ARE VERBATIM COPIED, AND I
10:11AM 22 ALSO FIND THAT ARISTA COPIED INSOFAR AS ANY OF THE OTHER
10:11AM 23 BUILDING BLOCKS APPEAR ON ARISTA'S CLI AS VERBATIM COPIES.

10:12AM 24 YOU COULD DECIDE THAT NOW.

10:12AM 25 THE COURT: I SEE.

10:12AM 1 MS. SULLIVAN: YOUR HONOR, WE HAVE ENUMERATED THIS IN
10:12AM 2 DISCOVERY, SO WE PROVIDED DISCOVERY RESPONSES AND EXPERT
10:12AM 3 TESTIMONY THAT ENUMERATES. BUT WE THINK IT WOULD BE VERY
10:12AM 4 CUMBERSOME FOR THE COURT TO HAVE TO GO THROUGH THAT ENUMERATION
10:12AM 5 NOW.

10:12AM 6 THE COURT: YES, IT WAS. AND THAT'S WHAT I'M
10:12AM 7 WONDERING BECAUSE I WOULD TURN TO YOU TO PROVIDE AN APPENDIX
10:12AM 8 FOR ME FOR AN ORDER, BUT YOU ARE SUGGESTING IT'S NOT NECESSARY.

10:12AM 9 MS. SULLIVAN: IT'S NOT NECESSARY.

10:12AM 10 YOU COULD SIMPLY SAY THAT I FIND THAT ARISTA HAS COPIED
10:12AM 11 INsofar AS ITS CLI, BUILDING BLOCK, BUILDING BLOCK, BUILDING
10:12AM 12 BLOCK, VERBATIM INCORPORATES CISCO'S BUILDING BLOCK, BUILDING
10:12AM 13 BLOCK, BUILDING BLOCK. AND WE COULD FASHION AN ORDER THAT
10:12AM 14 CAPTURES THAT WITHOUT MAKING YOUR HONOR COUNT.

10:12AM 15 BUT I ASSURE YOU YOUR HONOR, THE ENUMERATION IS IN THE
10:12AM 16 SUMMARY JUDGEMENT RECORD INsofar AS WE PROVIDED IN DISCOVERY.

10:12AM 17 IF I COULD TURN TO THE ANIMATIONS JUST TO ILLUSTRATE MY --
10:12AM 18 FORGIVE THE HUMBLE ANALOGY OF THE EPISTOLARY NOVEL OF THE HUMAN
10:12AM 19 TALKING TO THE SWITCH.

10:13AM 20 BUT IMAGINE THAT WE HAVE OUR SYSTEMS ADMINISTRATOR SITTING
10:13AM 21 AT THE COMPUTER AND ONE THING THAT -- I'M SORRY. HE TYPES IN A
10:13AM 22 COMMAND.

10:13AM 23 FIRST WE ARE IN A MODE, FIRST WE CAN SEE EVERYTHING,
10:13AM 24 PARENTAL-USE MODE OR ARE WE CAN BE IN, YOU CAN ONLY SEE SOME
10:13AM 25 THINGS, KIND OF A KID-FRIENDLY MODE.

10:13AM 1 THE PROMPT, WHICH IS FLASHING HERE, WILL TELL US WHAT MODE
10:13AM 2 WE ARE IN. SO NOW WE ARE GOING TO ENTER THE COMMAND. WE ARE
10:13AM 3 GOING TO ENTER A MULTI-WORD COMMAND EXPRESSION WHICH IT'S A
10:13AM 4 LITTLE FAINT TO SEE, BUT IF YOU SEE, IF SAYS SHOW MPLS
10:13AM 5 FORWARDING TABLE.

10:13AM 6 OKAY. THAT MAY NOT SOUND LIKE POETRY, BUT IT'S A VERBAL
10:13AM 7 EXPRESSION WHICH WAS CHOSEN ORIGINALLY AND CREATIVELY FROM
10:13AM 8 AMONG MANY OTHER POSSIBLE VERBAL EXPRESSIONS AS THE WAY TO ASK
10:13AM 9 THE SWITCH TO GIVE US SOME INFORMATION.

10:13AM 10 ONCE THAT IS NOW SENT TO THE SWITCH, THE COMMAND IS
10:14AM 11 ANALYZED AND VALIDATED BY THE SWITCH OR THE ROUTER. AND I WANT
10:14AM 12 YOUR HONOR TO SEE WHAT HAPPENS NEXT. THIS IS THE LETTER BACK
10:14AM 13 IN THE EPISTOLARY NOVEL FROM THE SWITCH. AND YOU WILL SEE IT'S
10:14AM 14 A VERBAL TEMPLATE AND A VERBAL DESCRIPTION, IT'S A SET OF WORDS
10:14AM 15 THAT WERE CHOSEN BY CISCO ENGINEERS.

10:14AM 16 THERE COULD HAVE BEEN ANY NUMBER OF OTHER WORDS ACROSS THE
10:14AM 17 TOP AXIS TO DESCRIBE WHAT MPLS FORWARDING TABLE LOOKS LIKE.
10:14AM 18 THERE COULD HAVE BEEN ANY NUMBER MUCH WORDS DOWN THE
10:14AM 19 DESCRIPTIONS IN THE SECOND COLUMN FROM THE LEFT. ALL OF THOSE
10:14AM 20 WORDS ARE VERBAL EXPRESSIONS CHOSEN CREATIVELY AND ORIGINALLY
10:14AM 21 BY CISCO. SO THAT'S WHAT WE MEAN BY ORIGINAL SCREEN DISPLAYS.

10:14AM 22 THEN IF WE COULD JUST KEEP GOING TO THE NEXT SLIDE. WE ARE
10:14AM 23 GOING TO SEE THAT DIFFERENT COMMANDS WILL RETURN DIFFERENT
10:14AM 24 OUTPUTS.

10:14AM 25 SO LET'S GO BACK TO THE HELP QUESTION. LET'S SAY I FORGET

10:14AM 1 WHAT SOMETHING MEANS. I WANT TO ASK WHAT IT MEANS, SO I'M
10:15AM 2 GOING TO ASK THE SWITCH TO TELL ME WHAT IT MEANS BY PUTTING A
10:15AM 3 QUESTION MARK AFTER MY MULTI-WORD COMMAND.

10:15AM 4 I'M PUTTING IN A USER REQUEST FOR A HELP DESCRIPTION FOR
10:15AM 5 THE TERM INTERFACE. INTERFACE, QUESTION MARK. THAT QUESTION
10:15AM 6 GOES OVER TO THE SWITCH OR THE ROUTER AND NOW THE ROUTER WILL
10:15AM 7 ANSWER ME. I'M HUMANIZING IT. THE PROGRAM AND THE ROUTER WILL
10:15AM 8 ANSWER ME WITH A HELP DESCRIPTION.

10:15AM 9 AND WE ARE GOING TO SHOW YOU SOME HELP DESCRIPTIONS LATER
10:15AM 10 THAT YOU CAN ACTUALLY READ AND SHOW YOU HOW ARISTA COPIED THEM.

10:15AM 11 SO THAT'S A SPECIALIZED KIND OF SCREEN DISPLAY THAT COMES
10:15AM 12 TO ME WHEN I'VE ASKED A QUESTION. HELPDESC OR HELP
10:15AM 13 DESCRIPTION. AND THAT'S THE NEXT BUILDING BLOCK.

10:15AM 14 AND THEN IF WE GO TO THE NEXT SLIDE, WE TRIED TO PUT THEM
10:15AM 15 ALL INTO ONE PLACE BECAUSE THE ENGINEERS ARE THINKING ABOUT ALL
10:15AM 16 OF THIS AT ONCE, THIS IS A CRUDE SLIDE TO SHOW YOU THAT THE
10:15AM 17 BUILDING BLOCKS ARE ALL BEING CREATED, THIS IS ON SLIDE 8. WE
10:16AM 18 HAVE GOT OUR ENGINEERS TRYING TO FIGURE OUT WHAT THE MULTI-WORD
10:16AM 19 COMMAND SHOULD BE.

10:16AM 20 HERE SHOW IPV-6 ACCESS-LIST. HOW DO WE GET TO THAT
10:16AM 21 COMMAND? IF YOU LOOK IN THE UPPER RIGHT, THIS IS OUR LAWYER
10:16AM 22 REPRESENTATION OF THE HIERARCHY, BUT THE HIERARCHY IS IN THE
10:16AM 23 CODE. LET'S SAY THAT SHOW IS MY FIRST WORD, MY SECOND WORD
10:16AM 24 MIGHT BE ANY OF THE ONES IN THE HIERARCHY AAA, OR IP, OR IN
10:16AM 25 THIS CASE IPV-6. AND THEN THERE MIGHT BE A SUB-HIERARCHY

10:16AM 1 BEYOND THAT. SO THE HIERARCHY IS NOT SOMETHING THE LAWYERS
10:16AM 2 MADE UP, THE HIERARCHY IS HOW THE CODE KNOWS WHAT WORD WITH
10:16AM 3 FOLLOW WHAT NEXT WORD.

10:16AM 4 FAMILY OR KIDS, ANDY, BOB, CHARLIE, IT'S NOT THAT WE ARE
10:16AM 5 CLAIMING THE CONCEPT OF A FAMILY TREE, WE ARE SAYING WHEN THE
10:16AM 6 TREE IS KIDS AND IT TAKES YOU TO ANDY, BOB, CHARLIE INSTEAD OF
10:16AM 7 DAVID, EDWARD, FRANK, THAT IS A PROTECTED HIERARCHY, THAT IS
10:16AM 8 ALL WE MEAN BY HIERARCHY.

10:17AM 9 THE MODES AND PROMPTS ARE DEPICTED IN THE LOWER RIGHT. WE
10:17AM 10 ARE GOING TO GET A DIFFERENT SET OF MULTI-WORD COMMANDS OR
10:17AM 11 HIERARCHAL ORDERING OF THE MULTI-WORD COMMANDS DEPENDING ON
10:17AM 12 WHAT MODE WE ARE IN, SIGNALLED BY A DIFFERENT PROMPT. IF WE
10:17AM 13 GET IN TROUBLE, WE ARE GOING TO HAVE OUR HELP DESCRIPTION DOWN
10:17AM 14 IN THE LOWER LEFT THAT'S GOING TO COME BACK TO US TELL US WHAT
10:17AM 15 A COMMAND MEANS.

10:17AM 16 AND IT'S ALL WRITTEN UP IN THE UPPER LEFT IN THE TECHNICAL
10:17AM 17 DOCUMENTS. SO ALL OF THAT TOGETHER COMPRISES OUR ORIGINAL CLI.

10:17AM 18 OKAY. NOW YOUR HONOR, ALL YOU NEED TO DECIDE AT THE
10:17AM 19 SUMMARY JUDGEMENT STAGE IS THAT ON OUR FIRST ARGUMENT, IS THAT
10:17AM 20 THE CLI AS A WHOLE IS ORIGINAL. WE HAVE A VALID COPYRIGHT AND
10:17AM 21 OWNERSHIP OF THE CLI COMPOSED OF THESE PARTS. YOU DON'T HAVE
10:17AM 22 TO DECIDE YET WHICH ONES ARISTA HAS ACTUALLY INFRINGED. THAT'S
10:17AM 23 FOR THE JURY. AND WE THINK THAT THERE CAN BE NO DISPUTE OF
10:17AM 24 FACT ON ORIGINALITY.

10:18AM 25 AND LET ME GO RIGHT TO SOME OF THE EVIDENCE. WE WILL TALK

10:18AM 1 ABOUT THE REGISTRATION AND ITS STATUS IN A MINUTE, BUT LET'S GO
10:18AM 2 RIGHT TO SOME OF THE KEY EVIDENCE.

10:18AM 3 THERE IS AMPLE CISCO ENGINEER EVIDENCE THAT CAN'T BE
10:18AM 4 DISPUTED BY ARISTA AS TO THE ORIGINATION OF THE MULTI-WORD
10:18AM 5 COMMANDS.

10:18AM 6 SO FOR EXAMPLE, IF YOU LOOK AT SLIDE NUMBER 9, YOU SEE THE
10:18AM 7 FOUNDING ENGINEER, KIRK LOUGHEED, WHO WAS ONE OF THE CISCO
10:18AM 8 ENGINEERS WHO DEVELOPED THE CLI FROM THE BEGINNING AND HAD
10:18AM 9 PERHAPS THE MOST IMPORTANT ROLE, KIRK LOUGHEED IS THE JAMES
10:18AM 10 MADISON OF OUR CONSTITUTION HERE.

10:18AM 11 IF YOU LOOK AT THE RED UNDERLINE SENTENCE, IT'S VERY
10:18AM 12 HELPFUL. WHEN HE CAME UP WITH THE WORD "SHOW" TO START A
10:18AM 13 COMMAND, LIKE THE ONE WE JUST LOOKED AT, SHOW IPV-6, HE HAD A
10:18AM 14 NUMBER OF POSSIBILITIES. HE COULD CHOOSE SHOW, HE COULD CHOSE
10:18AM 15 PRINT, HE COULD CHOOSE DISPLAY, HE COULD CHOOSE LIST, AND HE
10:18AM 16 CHOSE SHOW BECAUSE, AS HE TESTIFIED ELSEWHERE, THAT WAS WHAT HE
10:19AM 17 VIEWED AS THE BEST AESTHETIC CHOICE, VERBAL AESTHETIC CHOICE.

10:19AM 18 YOUR HONOR, YOU WILL SEE THE SAME THING ON THE NEXT SLIDE
10:19AM 19 ON PAGE 10. THIS IS MR. LOUGHEED SAYING WHEN HE CREATED THE
10:19AM 20 MULTI-WORD COMMAND SHOW HOSTS, THAT WAS CREATIVE BECAUSE HE
10:19AM 21 COULD HAVE, AND IF YOU LOOK AT THE RED UNDERLINE TOWARD THE END
10:19AM 22 SAID, SHOW COMPUTERS, SHOW NAMES, SHOW SYSTEMS, SHOW NETWORK
10:19AM 23 SYSTEMS, SOME PEOPLE THOUGHT SHOW END SYSTEMS. BUT HOST WAS
10:19AM 24 WHAT HE ENDED UP CHOOSING.

10:19AM 25 OVERWHELMING TESTIMONY TO THAT EFFECT NOT ONLY FROM

10:19AM 1 MR. LOUGHEED, BUT FROM OTHER CISCO ENGINEERS, FOR EXAMPLE MR.
10:19AM 2 ROY, ANOTHER CISCO ENGINEER ON SLIDE 11, TALKS ABOUT THIS
10:19AM 3 PROCESS OF CREATION AS CHOOSING THE WORDS FOR THE MULTI-WORD
10:19AM 4 COMMAND EXPRESSIONS THAT MAKE SENSE AND ARE AESTHETICALLY
10:19AM 5 CORRECT, CONTRIBUTE TO ARCHITECTURE PURITY, MAKE SENSE FROM AN
10:20AM 6 AESTHETIC PERSPECTIVE, FROM AN ALIGNMENT AND ARCHITECTURAL
10:20AM 7 PERSPECTIVE. YOU GO WITH YOUR KNOWLEDGE AND JUDGMENT.

10:20AM 8 I KNOW YOUR HONOR HAS REFLECTED BEFORE ON THE NINTH CIRCUIT
10:20AM 9 CASE ABOUT THE RARE COIN VALUATION, THE CDN COINS CASE, AND
10:20AM 10 THAT CASE IS VERY IMPORTANT HERE BECAUSE IT REMINDS US THAT
10:20AM 11 WHEN THERE'S A CREATIVE PROCESS OF ANALYSIS AND JUDGMENT, TAKE
10:20AM 12 A BUNCH OF INPUTS ABOUT HOW RARE COINS ARE VALUED ELSEWHERE BUT
10:20AM 13 YOU EXERCISE JUDGMENTS ABOUT WHAT YOU THINK THE PRICE TABLE
10:20AM 14 SHOULD LOOK LIKE, THAT PROCESS IS A CREATIVE ONE. AND WE HAVE
10:20AM 15 OVERWHELMING AND UNDISPUTED EVIDENCE THAT THAT'S A CREATIVE
10:20AM 16 PROCESS.

10:20AM 17 NOW YOU DON'T HAVE TO JUST TAKE IT FROM CURRENT CISCO
10:20AM 18 EMPLOYEES. IF YOU TURN TO SLIDE 12, AND THIS IS THE LAST ONE
10:20AM 19 BEFORE WE GO INTO SOME CONFIDENTIAL SLIDES, THIS IS MR.
10:20AM 20 SWEENEY. MR. SWEENEY IS NOW A VP OF SOFTWARE AT ARISTA. BUT
10:21AM 21 HE'S A FORMER CISCO EMPLOYEE.

10:21AM 22 AND THIS IS AN E-MAIL FROM BACK WHEN HE WAS AT CISCO IN
10:21AM 23 2004 AND HE WAS PART OF THE ENGINEERING PROCESS THAT CREATED
10:21AM 24 THE CLI COMMANDS, AND IF YOU LOOK AT THE FIRST LINE OF THE
10:21AM 25 HIGHLIGHTED TEXT THAT'S POPPED OUT IN THE BOX HE SAYS, I AGREE

10:21AM 1 THAT CLI NAMING IS VERY SUBJECTIVE.

10:21AM 2 SUBJECTIVE. CHOOSING SHOW VERSUS DISPLAY, CHOOSING HOST
10:21AM 3 VERSUS COMPUTERS IS VERY SUBJECTIVE. AND WHY IS IT SUBJECTIVE?
10:21AM 4 BECAUSE REMEMBER, THIS IS AN EPISTOLARY NOVEL BETWEEN A HUMAN
10:21AM 5 BEING AND A COMPUTER AND YOU WANT THE WORDS TO BE THE ONES THAT
10:21AM 6 WORK FOR THE HUMAN BEING, THE ONES THAT THE HUMAN BEING WILL BE
10:21AM 7 ABLE TO REMEMBER EASILY AND IMPLEMENT QUICKLY AND EFFICIENTLY
10:21AM 8 BECAUSE THEY BECOME RELEVANT, AESTHETICALLY BEAUTIFUL,
10:21AM 9 INTUITIVE TO USE.

10:21AM 10 THE COURT: HOW DOES ARISTA'S ARGUMENT IN ITS
10:21AM 11 AFFIRMATIVE MOTION FOR 197 OF THE COMMAND LINES THAT THERE
10:21AM 12 IS -- THERE WAS NO TIMELY REGISTRATION. AND THAT FOR, I
10:21AM 13 BELIEVE 153 OF THEM, YOU OFFER ABSOLUTELY NO EVIDENCE OF
10:22AM 14 ORIGINALITY, NO EVIDENCE OF AUTHORS.

10:22AM 15 DOES THAT PLAY INTO THIS, WHETHER I CONSIDER A HIGH LEVEL
10:22AM 16 DETERMINATION OF ORIGINALITY AND NOT A DETERMINATION OF WHETHER
10:22AM 17 EACH LINE INDIVIDUALLY IS ORIGINAL.

10:22AM 18 MS. SULLIVAN: YES, YOUR HONOR. LET ME ADDRESS THAT.

10:22AM 19 SO AS YOUR HONOR WELL KNOWS, AND JUST REMINDED US IN AN
10:22AM 20 ORDER A FEW WEEKS AGO ABOUT POPCORN KERNELS, IT'S THE POPCORN
10:22AM 21 KERNAL IMPLICATION. AS YOUR HONOR STATED THERE, IT IS SO CLEAR
10:22AM 22 THAT THE BAR FOR ORIGINALITY IS VERY LOW. ALL THAT IS REQUIRED
10:22AM 23 IS A MINIMAL LEVEL OF CREATIVITY UNDER FEIST, A MINIMAL SPARK
10:22AM 24 OF CREATION.

10:22AM 25 SO THE BAR IS VERY LOW. REGISTRATION SIMPLY IS A BURDEN

10:22AM 1 SHIFTING DEVICE THAT SAYS WHEN WE HAVE A PROPER REGISTRATION,
10:22AM 2 THE BURDEN SHIFTS TO ARISTA TO COME FORWARD WITH EVIDENCE THAT
10:22AM 3 IT WASN'T ORIGINAL

10:22AM 4 THE COURT: BUT IN THESE -- AND I KNOW I'M JUMPING TO
10:23AM 5 MR. VAN NEST'S ARGUMENT, BUT I THINK IT PLAYS INTO WHETHER I
10:23AM 6 CAN GRANT YOUR MOTION.

10:23AM 7 IF I DON'T EXERCISE MY DISCRETION, AS YOU REQUEST ON THE
10:23AM 8 SIX REGISTRATIONS THAT ARE NOT TIMELY, MAYBE IT'S OVER FOR
10:23AM 9 THAT. BUT IF I DON'T EXERCISE THAT, THEN YOU DON'T HAVE A
10:23AM 10 PRESUMPTION AND YOU ACTUALLY RETAIN THE BURDEN OF GOING
10:23AM 11 FORWARD.

10:23AM 12 MS. SULLIVAN: THAT'S CORRECT, YOUR HONOR.

10:23AM 13 WE THINK WE WIN OVERWHELMINGLY IF WE RETAIN THE BURDEN.
10:23AM 14 AND LET ME TELL YOU WHY, IN A NUT SHELL.

10:23AM 15 THE COURT: OKAY.

10:23AM 16 MS. SULLIVAN: WE GAVE ARISTA ACCESS TO OUR AUTHORS
10:23AM 17 AND INVENTORS AND SO FORTH AS THE COURT PERMITTED. YOU WILL
10:23AM 18 RECALL THAT JUDGE GREWAL, ARISTA WANTED US TO IDENTIFY THE
10:23AM 19 AUTHORS AND INVENTORS OF EVERY SINGLE ONE OF THE COMMANDS.

10:23AM 20 NOW, I DARE SAY, YOUR HONOR, I DON'T THINK ANY COMPANY HAS
10:23AM 21 EVER BEEN PUT TO THE EXPENSE AND BURDEN OF SUCH AN EXHAUSTIVE
10:23AM 22 RECITATION OF OUR AUTHORS AND INVENTORS. COULD YOU POP UP
10:24AM 23 EXHIBIT 64 --

10:24AM 24 THE COURT: AND I UNDERSTAND JUDGE COUSINS HAS
10:24AM 25 CONCLUDED THE DISCOVERY DISPUTES FURTHER TO YOUR ADVANTAGE.

10:24AM 1 MS. SULLIVAN: THAT'S CORRECT, YOUR HONOR.

10:24AM 2 JUDGE COUSINS DENIED BOTH THE MOTION TO STRIKE THE HELP
10:24AM 3 DESCRIPTION ALLEGATIONS BASED ON THE CONTENTION INTERROGATORY
10:24AM 4 TIMING, HE DENIED THAT AND HE ALSO DENIED THE MOTION TO COMPEL.

10:24AM 5 BUT YOUR HONOR, WHAT I'M CALLING YOUR ATTENTION TO, AND
10:24AM 6 THIS YOU CAN GET TO A NUMBER OF WAYS, IT'S EXHIBIT 54 TO THE
10:24AM 7 CANDIDO DECLARATION IN SUPPORT OF THE CISCO MOTION. YOU CAN
10:24AM 8 EQUALLY GET TO IT AS EXHIBIT 6 TO THE NEUKOM DECLARATION IN
10:24AM 9 SUPPORT OF OUR OPPOSITION TO ARISTA'S MOTION.

10:24AM 10 I'M NOT GOING TO GO THROUGH THIS NOW YOUR HONOR, I JUST
10:24AM 11 WANT YOU TO KNOW IT'S THERE, IT'S A LENGTHY LIST OF THE EXACT
10:24AM 12 AUTHOR AND INVENTOR FOR EACH ONE OF THE COMMAND LINE
10:24AM 13 EXPRESSIONS.

10:24AM 14 SO WE HAVE COME -- AND THIS IS A PRELUDE TO MY KEY POINT,
10:24AM 15 YOUR HONOR, WE HAVE SHOWN ARISTA SOMETHING THAT WE SHOULDN'T,
10:25AM 16 IN OUR VIEW, NECESSARILY BEEN COMPELLED TO SHOW, BECAUSE BASED
10:25AM 17 ON THE COINS CASE, WE SHOWED A PROCESS OF JUDGMENT AND WE ARE
10:25AM 18 ENTITLED TO THE INFERENCE THAT WE DIDN'T HAVE TO SHOW EVERY
10:25AM 19 PRICE OF EVERY COIN. BUT WE DID SHOW WHERE EVERY PRICE OF
10:25AM 20 EVERY COIN CAME FROM IN OUR PROCESS. WE DID SHOW THAT.

10:25AM 21 THEY HAD THE OPPORTUNITY TO DEPOSE EIGHT OF OUR INVENTORS
10:25AM 22 AND AUTHORS. THEY CAME TO YOUR HONOR AND THEY SAID WE NEED
10:25AM 23 NINE MORE. YOUR HONOR DENIED THAT, THAT'S IN YOUR ORDER IN
10:25AM 24 DOCKET 203. YOU DENIED THAT BECAUSE YOU SAID IT WOULD BE
10:25AM 25 CUMULATIVE.

10:25AM 1 AND YOU WERE EXACTLY RIGHT WHEN YOU DID THAT BECAUSE IT IS
10:25AM 2 DUPLICATIVE AND CUMULATIVE TO COME TO EVERY INVESTOR AND ASK,
10:25AM 3 WERE YOU ACTING ORIGINALLY? AND THE ANSWER WAS ALWAYS, ALWAYS
10:25AM 4 YES.

10:25AM 5 NOW YOUR HONOR, THEY HAVE NO EVIDENCE, ARISTA HAS COME UP
10:25AM 6 WITH NO EVIDENCE FROM ANY OF THE NINE INVENTOR DEPOSITIONS TO
10:25AM 7 SUGGEST LACK OF ORIGINALITY. THEY HAVE HAD AN EXPERT,
10:26AM 8 MR. BLACK, AND I THINK IT'S FAIR TO SAY, YOUR HONOR, THAT
10:26AM 9 ARISTA HAS SCOURED THE EARTH AND BOILED THE OCEAN LOOKING FOR
10:26AM 10 ANYONE, ANYWHERE IN THE WORLD, WHOEVER USED OUR MULTI-WORD
10:26AM 11 COMMAND EXPRESSIONS BEFORE WE DID, AND THEY HAVE COME UP SHORT
10:26AM 12 EXCEPT FOR TWO.

10:26AM 13 YOUR HONOR, THEIR EXPERT HAS SAID I FOUND SOMEONE WHO USED
10:26AM 14 "SHOW USERS" BEFORE AND I FOUND SOMEONE WHO USED "TERMINAL
10:26AM 15 LENGTH" BEFORE. THEY DIDN'T SHOW WE COPIED THEM.

10:26AM 16 BUT IF YOUR HONOR WANTS TO ENTER OUR ORDER SAYING 506
10:26AM 17 COMMAND LINES ARE ORIGINAL, WE WILL BE FINE WITH THAT.

10:26AM 18 BUT YOUR HONOR, THE REASON I'M GOING INTO THIS LONG
10:26AM 19 PROCEDURAL RECITATION IS THAT ORIGINALITY IS A LOW BAR, THIS IS
10:26AM 20 THE RARE CASE IN WHICH WE HAVE ACTUALLY HAD A LOT OF DISCOVERY
10:26AM 21 OVER THE ISSUE OF ORIGINALITY AND IT SHOULD BE AN EASY ONE.

10:26AM 22 NOW LET ME ADDRESS YOUR HONOR'S --

10:26AM 23 THE COURT: I'M JUST KEEPING AN EYE ON THE CLOCK.

10:26AM 24 MS. SULLIVAN: I'M SORRY, YOUR HONOR.

10:26AM 25 OKAY. ON THE REGISTRATIONS, VERY STRAIGHTFORWARD, 20

1 REGISTRATIONS -- AND YOU CAN LEAVE THE SCREEN BLANK NOW IF YOU
2 COULD, YOUR HONOR.

3 WE HAVE THE PRESUMPTION OF VALIDITY BASED ON 20 OF THE
4 REGISTRATIONS, THAT'S NOT CONTESTED. WE BELIEVE YOUR HONOR
5 CLEARLY SHOULD EXERCISE YOUR DISCRETION TO HOLD THAT WE ALSO
6 GET THE PRESUMPTION ON THE OTHER SIX. BECAUSE THE OTHER SIX
7 REGISTRATIONS ALL PERTAIN, ALL CONTAIN OUR OWN COPYRIGHTED
8 MATERIAL.

9 SO WHEN A NEW REGISTRATION REFERS BACK TO OUR OLD
10 COPYRIGHTED MATERIAL, AND I WANT TO BE VERY CLEAR YOUR HONOR,
11 WE ALWAYS PUBLISHED COPYRIGHT NOTICE ON OUR MATERIALS. WE
12 ALWAYS SAID IT'S OUR MATERIAL.

13 REGISTRATION DOESN'T DETERMINE WHETHER WE HAVE THE
14 COPYRIGHT, IT JUST DETERMINES WHETHER WE CAN SUE. SO THE LATE
15 FILED REGISTRATION DOESN'T GO TO WHETHER WE HAVE THE COPYRIGHT.
16 AND WE GAVE YOU AMPLE CASE LAW, YOUR HONOR, THE KEY CASE WHICH
17 WE WOULD REFER YOUR HONOR TO IS CJ PRODUCTS, CITING OTHER
18 DISTRICT COURT CASES.

19 YOU CLEARLY HAVE THE DISCRETION TO TREAT THE LATE FILED
20 REGISTRATION, SO CALLED LATE FILED REGISTRATIONS, AS CREATING A
21 PRESUMPTION OF VALIDITY. WE THINK YOU SHOULD EXERCISE IT HERE
22 BECAUSE AS I HAVE JUST DESCRIBED, ARISTA CAME BACK WITH NOTHING
23 AFTER AN EXHAUSTIVE DISCOVERY PROCESS OTHER THAN TWO COMMANDS
24 TO SHOW USERS AND TERMINAL LENGTHS THAT HAD EVER BEEN USED BY
25 ANYBODY BEFORE.

10:28AM 1 SO WE THINK YOU CAN DECIDE ORIGINALITY USING THE
10:28AM 2 PRESUMPTION. WE THINK IF YOU HAVE TO GET TO ORIGINALITY ON OUR
10:28AM 3 BURDEN WE STILL WIN BECAUSE WE HAVE PUT ON OUR ENGINEERING
10:28AM 4 EVIDENCE.

10:28AM 5 I REFER YOU TO SLIDES 13 AND 14 AND 15 WHICH ARE ALL
10:28AM 6 ADMISSIONS BY ARISTA EXECUTIVES, THAT CLI CREATION IS
10:28AM 7 SUBJECTIVE.

10:28AM 8 SLIDE 13, IF YOU LOOK AT THE HIGHLIGHTED WORDS, YOU WILL
10:28AM 9 SEE THAT WE HAVE ARISTA WITNESSES ADMITTING THE SUBJECTIVITY OF
10:28AM 10 THE PROCESS.

10:28AM 11 SLIDE 14 IS ARISTA'S EXPERT TALKING ABOUT THE SUBJECTIVITY
10:29AM 12 OF THE PROCESS.

10:29AM 13 SLIDE 15 IS ANOTHER EXPERT.

10:29AM 14 LET'S GO TO THE PUBLIC SLIDES NOW, AND IF WE COULD PUT UP
10:29AM 15 STARTING WITH SLIDE 16, AND REFER YOUR HONOR TO SLIDE 16, 17
10:29AM 16 AND 18, BECAUSE HERE'S WHERE WE HAVE A VERY IMPORTANT ADMISSION
10:29AM 17 FROM ARISTA WHICH WE THINK IS UNANSWERABLE ON OUR POINT THAT
10:29AM 18 OUR CREATION OF CLI WAS ORIGINAL.

10:29AM 19 SO THE LAST AND ONLY TIME THAT CISCO EVER WENT TO COURT AS
10:29AM 20 A PLAINTIFF OVER CLI WAS AGAINST A COMPANY CALLED HUAWEI. AND
10:29AM 21 A CURRENT ARISTA BOARD MEMBER, MR. CHARLES GIANCARLO, HE'S A
10:29AM 22 CURRENT ARISTA BOARD MEMBER, HE WAS ONE OF THE EXECUTIVES IN
10:29AM 23 CHARGE OF CISCO'S SUIT AGAINST HUAWEI FOR STEALING OUR CLI --
10:29AM 24 I'M SORRY, FOR INFRINGING OR CLI.

10:30AM 25 NOW YOUR HONOR, LET'S LOOK AT THE KEY LANGUAGE FROM

10:30AM 1 MR. GIANCARLO'S DECLARATION FROM THE HUAWEI CASE.

10:30AM 2 SLIDE 16 IS IN THERE JUST TO TELL YOU HE WAS THE EXECUTIVE
10:30AM 3 IN CHARGE OF INITIATING AND PURSUING THE CISCO LAWSUIT IN
10:30AM 4 HUAWEI. AND HERE'S WHAT CISCO'S OWN BOARD MEMBERS SAID AT THAT
10:30AM 5 TIME ABOUT OUR CLI USER INTERFACE AND WHETHER IT WAS ORIGINAL.
10:30AM 6 AND IT'S WORTH READING THIS IN ITS ENTIRETY.

10:30AM 7 CISCO'S -- YOUR HONOR, I'M ON LINE 17 IN THE HIGHLIGHTED
10:30AM 8 SENTENCE. "CISCO'S PROPRIETARY IOS IS ONE OF THE" -- WHICH
10:30AM 9 CONTAINS THE CLI -- "IS ONE OF THE COMPANY'S MOST VALUABLE
10:30AM 10 ASSETS AND A CRITICAL COMPONENT OF CISCO'S BUSINESS. THE SAME
10:30AM 11 HOLDS TRUE FOR THE CLI USER INTERFACE IMPLEMENTED BY THE IOS.
10:30AM 12 THIS INTERFACE, WHICH IS UNIQUE TO CISCO," THERE'S YOUR
10:30AM 13 ORIGINALITY ADMISSION, "HAS BEEN DEVELOPED OVER MANY YEARS
10:30AM 14 THROUGH THE EXPENDITURE BY CISCO OF HUNDREDS OF MILLIONS OF
10:30AM 15 DOLLARS."

10:30AM 16 AND CISCO HAS ALSO EXPENDED CONSIDERABLE EFFORTS AND
10:30AM 17 RESOURCES IN TRAINING ITS CUSTOMERS ON THE CLI INTERFACE.

10:31AM 18 ONE ASPECT OF THIS IS THE EXTENT OF USER DOCUMENTATION
10:31AM 19 CISCO HAS PREPARED TO DESCRIBE IOS AND THE CLI TO EDUCATE
10:31AM 20 CUSTOMERS ON THAT USE.

10:31AM 21 AND IF YOU LOOK AT THE NEXT PAGE, TO PAGE 18, YOU WILL SEE
10:31AM 22 THAT MR. GIANCARLO AT THAT TIME, NOW AN ARISTA BOARD MEMBER,
10:31AM 23 SAID THAT HUAWEI'S UNLAWFUL COPYING OF THE CLI WILL CAUSE CISCO
10:31AM 24 SUBSTANTIAL IRREPARABLE INJURY.

10:31AM 25 SO YOUR HONOR, VERY NARROW, WE JUST WANT TO SAY IT'S

1 ORIGINAL, WE HAVE ARISTA'S ADMISSIONS THAT CLI CREATION IS
2 SUBJECTIVE AND CREATIVE, AND WE HAVE ARISTA'S ADMISSION THAT IT
3 WAS UNIQUE. WE ARE HAPPY TO LET YOU TAILOR THE ORDER TO KNOCK
4 TWO OF THE COMMANDS OUT INsofar AS "SHOW USERS" AND "TERMINAL
5 LENGTH" MAY HAVE PREEXISTED THEM EVEN IF WE DIDN'T COPE THEM,
6 BUT YOUR HONOR, YOU CAN SAY THAT THE CLI AS A WHOLE IS ORIGINAL
7 AT THIS POINT.

8 THAT'S WHAT WE WOULD RESPECTFULLY ASK FOR ON THE FIRST
9 ISSUE. WE DON'T THINK ARISTA HAS PUT THAT INTO ANY LEGITIMATE
10 DISPUTE.

11 NOW YOUR HONOR, I'M SURE MR. VAN NEST WILL DISAGREE
12 STRENUOUSLY, BUT I BELIEVE THAT ALL HE WILL -- BE ABLE TO DO,
13 GIVEN THE RECORD, IS MAYBE SAY INDIVIDUAL WORDS PRE-EXISTED.

14 WE DIDN'T INVENT THE WORD SHOW. WE DIDN'T INVENT THE WORD
15 USERS. THERE ARE SOME INDUSTRY STANDARDS THAT MAY HAVE
16 GENERATED AN ABBREVIATION LIKE PTP. WE DIDN'T INVENT EVERY
17 WORD.

18 BUT AS THE FEDERAL CIRCUIT SAID IN THE ORACLE V. GOOGLE
19 DECISION, JUST BECAUSE CHARLES DICKENS *TALES OF TWO CITIES* USED
20 WORDS IN A PARAGRAPH THAT EXISTED IN HIS PRIOR NOVEL DOESN'T
21 MEAN THAT THE COMBINATION OF THE WORDS ISN'T ORIGINAL.

22 SO YOUR HONOR, THAT'S WHAT WE THINK WE SHOULD WIN ON IS
23 ORIGINALITY.

24 I KNOW I WENT PAST THE TIME, BUT DO YOU WANT ME TO COVER
25 COPYING, VERY BRIEFLY, OR DO YOU WANT TO HEAR FROM MR. VAN NEST

10:32AM 1 ON COPYRIGHTABILITY?

10:32AM 2 THE COURT: I ACTUALLY WANTED YOU TO MAKE YOUR FULL
10:32AM 3 PRESENTATION AND THEN I WILL LET HIM. I THINK THAT'S EFFICIENT
10:32AM 4 SO YOU CAN KEEP YOUR TRAIN OF THOUGHT.

10:32AM 5 MS. SULLIVAN: VERY GRATEFUL FOR THAT, YOUR HONOR.

10:32AM 6 AND IF WE COULD TURN NEXT TO OUR ELEMENT OF COPYING.

10:33AM 7 AND AGAIN, OUR ARGUMENT IS SIMPLY THAT ARISTA COPIED THE
10:33AM 8 CISCO'S CLI. THIS IS THE SECOND PART OF OUR MOTION. AND BY
10:33AM 9 THIS WE MEAN VERBATIM COPYING, NOT SUBSTANTIAL SIMILARITY. NOW
10:33AM 10 I WOULD LIKE TO BEGIN, IF WE COULD, WITH A QUOTE FROM
10:33AM 11 MR. KEN DUDA WHO IS THE CHIEF TECHNOLOGY OFFICER OF ARISTA.

10:33AM 12 AND I WOULD LIKE TO PLAY YOU A PUBLIC STATEMENT. IT'S
10:33AM 13 WORTH IN LISTENING TO, THAT DESCRIBES HOW ARISTA RESPONDED TO
10:33AM 14 CISCO'S CLI.

10:33AM 15 (WHEREUPON AN AUDIO RECORDING WAS PLAYED IN OPEN COURT.)

10:33AM 16 MS. SULLIVAN: OKAY. GREAT. THANK YOU VERY MUCH.

10:34AM 17 SO MR. DUDA SAID WE ACTUALLY COPIED IT SLAVISHLY, EVEN THE
10:34AM 18 THINGS WE THOUGHT WERE REALLY SILLY.

10:34AM 19 WE HAVE EXTENSIVE SIMILAR EVIDENCE, I'M NOT GOING TO
10:34AM 20 BELABOR IT NOW, YOU CAN SEE IT IN THE DECK, SOME OF IT IS
10:34AM 21 CONFIDENTIAL, BUT AT SLIDES 22 THROUGH 26 AT YOUR SCREEN, YOU
10:34AM 22 WILL SEE THIS IS OTHER EVIDENCE SIMILAR TO THAT ABOUT SLAVISH
10:34AM 23 COPYING ABOUT PARTICULAR BUILDING BLOCKS.

10:34AM 24 YOU WILL SEE IN THOSE SLIDES, ALTHOUGH THEY ARE
10:34AM 25 CONFIDENTIAL, THE REASONS WHY. I CAN SAY THAT THE REASON WAS

10:34AM 1 ESSENTIALLY TO MAKE THE EXPERIENCE OF TURNING ON AN ARISTA
10:34AM 2 SWITCH AND SEEING THE CISCO CLI, SEAMLESS FOR SOMEONE WHO WAS
10:34AM 3 RAISED AND TRAINED ON CISCO CLI. THAT'S WHY IT WAS COPIED
10:34AM 4 VERBATIM.

10:34AM 5 SO WE HAVE AS CLEAR A RECORD HERE BY ADMISSIONS FROM ARISTA
10:34AM 6 OF SLAVISH COPING AS WE COULD EVER HAVE IN A COPYRIGHT CASE.

10:35AM 7 IF I COULD REFER TO SLIDE 27, THAT IS PUBLIC. AFTER OUR
10:35AM 8 LAWSUIT WAS FILED, MS. ULLAL, MS. JAYSHREE ULLAL, WHO IS THE
10:35AM 9 CEO, CHIEF EXECUTIVE OFFICER OF ARISTA AND OF COURSE A FORMER
10:35AM 10 CISCO EMPLOYEE, SHE ADMITTED TO THE VERBATIM COPYING OF THE
10:35AM 11 TECHNICAL DOCUMENTS.

10:35AM 12 AND IN THE HIGHLIGHTED SECTIONS OF THIS SLIDE THEY SAY WE
10:35AM 13 HAVE COPIED PIECES OF THEIR DOCUMENTATION. THIS IS SOMETHING
10:35AM 14 THAT IS COMPLETELY UNACCEPTABLE. I OWN UP TO THAT. THAT'S A
10:35AM 15 MISTAKE.

10:35AM 16 SO WE HAVE ADMITTED COPYING, YOUR HONOR.

10:35AM 17 SO IF I COULD TURN YOUR HONOR AGAIN TO ANOTHER ADMISSION,
10:35AM 18 IT WOULD BE ON PAGE 29. I'M NOW GOING TO GO COMPONENT BY
10:35AM 19 COMPONENT BRIEFLY. SO WE HAVE THE ADMISSIONS OF SLAVISH
10:35AM 20 COPYING OF THE CLI AS A WHOLE. NOW LET ME SHOW YOU WHAT'S IN
10:35AM 21 THE RECORD ABOUT VERBATIM COPING OF THE PARTICULAR BUILDING
10:35AM 22 BLOCKS.

10:35AM 23 YOUR HONOR AT PAGE 29 WE HAVE HERE THE ORIGINAL ANSWER TO
10:36AM 24 THE ORIGINAL COMPLAINT IN WHICH AT PARAGRAPH 53 OF THE ORIGINAL
10:36AM 25 ANSWER, DOCKET 36, ARISTA ADMITS THAT IT USES THE IOS COMMAND

1 EXPRESSIONS INCLUDED IN EXHIBIT 1 TO CISCO'S COMPLAINT.

2 THAT WAS -- SO REMEMBER OF COURSE WE HAD MILD AN AMENDED
3 COMPLAINT, YOUR HONOR PERMITTED US TO AMEND, THERE WAS AN
4 ANSWER TO THE SECOND AMENDED COMPLAINT, AND THAT ANSWER NOW
5 DENIES IT.

6 SO ARISTA HAS CHANGED ITS PLEADING. BUT YOUR HONOR, THIS
7 WOULD BE AN ADMISSION THAT WE COULD CERTAINLY USE OF THE
8 COPYING OF THE COMMANDS. BUT YOUR HONOR, ARISTA CAN'T REALLY
9 CONTEST THAT THE COMMAND EXPRESSIONS ARE COPIED VERBATIM.

10 NOW REMEMBER, ARISTA LIKES TO CALL THEM COMMAND
11 ABSTRACTIONS. YOUR HONOR THEY ARE NOT COMMAND ABSTRACTIONS
12 THEY ARE COMMAND EXPRESSIONS, PARTICULAR WORDS WRITTEN IN A
13 PARTICULAR ORDER AND IF YOU LOOK COLUMN A IS THE CISCO COMMAND
14 EXPRESSIONS, COLUMN B IS THE ARISTA COMMAND EXPRESSIONS.

15 THIS IS LETTER I TYPE TO THE SWITCH, AND WHEN I SIT DOWN AT
16 MY ARISTA SWITCH I TYPE IN THE IDENTICAL COMMAND EXPRESSIONS.
17 THIS IS WHAT WE HAVE ALLEGED FOR ALL OF THE COMMAND EXPRESSIONS
18 IN OUR EXHIBIT.

19 YOUR HONOR, WE ARE NOT SAYING THAT EVERYTHING ARISTA DOES
20 COPIES US, THEY HAVE DEVELOPED OVER THE YEARS, SOME OF THEIR
21 OWN COMMAND EXPRESSIONS. WE ARE JUST ASSERTING THE ONES THAT
22 ARE VERBATIM COPIED.

23 SECOND YOUR HONOR, IF YOU TURN TO PAGE 31 OF THE SLIDES,
24 YOU WILL SEE THIS IS WHERE WE TRY TO ILLUSTRATE THAT ONCE AGAIN
25 THE HIERARCHIES THEMSELVES ARE VERBATIM COPIED. AND BY THAT WE

10:37AM 1 MEAN, NOW THIS IS A LAWYER CREATION, BUT THE VERBATIM COPYING
10:37AM 2 IS WHAT AM I ALLOWED TO DO ONCE I TYPE IN CLEAR, LET'S TAKE THE
10:37AM 3 CLEAR EXAMPLE IN THE LEFT COLUMN.

10:37AM 4 WELL, CLEAR LETS ME GET TO COUNTERS. SO I CAN WRITE CLEAR
10:37AM 5 COUNTERS, THEN I'M DONE. BUT CLEAR CAN ALSO TAKE ME TO IP
10:37AM 6 WHICH IS THE SECOND WORD IN THE MULTI-WORD EXPRESSION. AND
10:38AM 7 THEN THAT WOULD LEAD ME TO ANOTHER SET OF CHOICES. I COULD
10:38AM 8 WRITE CLEAR IP, THEN THE HIERARCHY IN THE CODE WOULD LET ME
10:38AM 9 TYPE IN ARP, BGP OR IGMP GROUP. THAT'S ANDY, BOB, CHARLIE.

10:38AM 10 AND THAT HIERARCHY IS JUST AS ORIGINAL TO US AND JUST AS
10:38AM 11 MUCH COPIED WHEN THE MULTI-WORD COMMANDS ARE COPIED. THAT'S
10:38AM 12 BECAUSE THEY DON'T LET YOU GET TO DAVID, ED, FRANK, THEY LET
10:38AM 13 YOU GET TO ANDY, BOB, AND CHARLIE.

10:38AM 14 THE COURT: WHY ISN'T THIS LIKE THE BIKRAM'S YOGA
10:38AM 15 CASE THOUGH WHEN THE 26 POSES WERE NOT PROTECTED, NOT JUST THE
10:38AM 16 IDEA OF A SEQUENCE.

10:38AM 17 MS. SULLIVAN: IT'S SO UNLIKE THE YOGA POSES,
10:38AM 18 YOUR HONOR.

10:38AM 19 THE POSE, DOWNWARD FACING DOG, IS UNPROTECTABLE. BUT THE
10:38AM 20 WORDS TO DO THE DOWNWARD FACING DOG, PLACE YOUR HANDS ON THE
10:38AM 21 GROUND, ARE PROTECTED.

10:38AM 22 THEY COPIED THE WORDS TO DO THE DOWNWARD FACING DOG. OR
10:39AM 23 THE HIERARCHY THAT SAYS DOWNWARD FACING DOG, NEXT STEP, START
10:39AM 24 WITH HANDS, START WITH FEET, START WITH TOES, I'M MAKING THIS
10:39AM 25 UP YOUR HONOR, BUT THE POINT IS WHAT WAS COPIED WAS NOT THE

10:39AM 1 POSE, WHAT WAS COPIED WAS THE WORDS USED TO GET THE YOGA
10:39AM 2 PRACTITIONER INTO THE POSE. ALL RIGHT. THAT'S THE DIFFERENCE.

10:39AM 3 ALL RIGHT, YOUR HONOR. QUICKLY, SCREEN OUTPUTS IS AN
10:39AM 4 EXTREMELY EASY ONE, IF YOU LOOK AT SLIDE 32.

10:39AM 5 I SEND MY LETTER TO THE SWITCH, THE SWITCH VALIDATES THE
10:39AM 6 COMMAND AND IT SENDS BACK A SCREEN OUTPUT. AND WE WILL BE ABLE
10:39AM 7 TO SHOW THE JURY VERBATIM COPYING OF COUNTLESS HELP
10:39AM 8 DESCRIPTIONS. WE ENUMERATED THEM IN THE EARLIER SLIDE. IF YOU
10:39AM 9 SEE, THESE ARE IDENTICAL RIGHT DOWN TO EVERY WORD.

10:39AM 10 AND YOUR HONOR, IF YOU GO TO THE NEXT SCREEN, SCREEN
10:39AM 11 OUTPUTS WE JUST LOOKED AT A HELP DESCRIPTION, BUT REMEMBER,
10:40AM 12 EVERY TIME I SEND A COMMAND TO THE SWITCH, THE SWITCH WRITES
10:40AM 13 WORDS BACK. AND WE ARE CLAIMING THAT THE SCREEN OUTPUTS ARE
10:40AM 14 IDENTICAL, VERBATIM COPIED. LEFT COLUMN, THE SAME AS THE
10:40AM 15 RIGHT, AS YOU CAN SEE JUST GLANCING AT THAT.

10:40AM 16 ADMISSION BY ARISTA'S OWN EXPERT THAT THE SCREEN OUTPUT IS
10:40AM 17 THE SAME NET EFFECT FROM THE USER'S PERSPECTIVE, SAME WORDS.

10:40AM 18 AND YOUR HONOR, HELP DESCRIPTIONS, THE HELP DESCRIPTIONS ON
10:40AM 19 SLIDE 35, I WRITE A COMMAND, I PUT A QUESTION MARK, THE HELP
10:40AM 20 DESCRIPTION THAT COMES BACK, WE SHOW YOU AN EXEMPLARY LIST OF
10:40AM 21 COMMANDS THAT HAVE BEEN VERBATIM COPIED. THIS IS SOMETHING THE
10:40AM 22 COMPUTER IS WRITING BACK WHEN I ASK IT, A QUESTION ABOUT THE
10:40AM 23 MEANING OF THE COMMAND BY USING A QUESTION MARK.

10:40AM 24 AND FINALLY, CISCO HAS ADMITTED IN ITS OPERATIVE ANSWER,
10:40AM 25 WHICH WE REPRINT ON SLIDE 36, THAT IT USES THE SAME COMMAND

10:41AM 1 MODES AND PROMPTS THAT WE IDENTIFIED IN OUR COMPLAINT.

10:41AM 2 SO IT'S ADMITTING TO COPYING OF MODES AND PROMPTS, AND WE
10:41AM 3 GIVE YOU EXAMPLES ON PAGE 37 OF THE IDENTICAL TITLES FOR THE
10:41AM 4 MODES IN OUR CLI AND ARISTA'S CLI. WE SAY USER EXEC, THEY SAY
10:41AM 5 EXEC. WE SAY PRIVILEGED EXEC --

10:41AM 6 THE COURT: SO LET ME ASK YOU A QUESTION ON THE MODES
10:41AM 7 AND PROMPTS.

10:41AM 8 IF I ACCEPT THAT THERE'S AN ADMISSION AND IF I FIND THAT
10:41AM 9 CISCO CLI, AT THE HIGH LEVEL IS ORIGINAL, THAT STILL ALLOWS FOR
10:41AM 10 TRIAL, A DETERMINATION OF WHETHER THESE FEATURES ARE
10:41AM 11 PROTECTABLE, CORRECT.

10:41AM 12 MS. SULLIVAN: CORRECT.

10:41AM 13 THE COURT: OKAY.

10:41AM 14 MS. SULLIVAN: EXACTLY CORRECT, YOUR HONOR.

10:41AM 15 THE COURT: ALL RIGHT.

10:41AM 16 MS. SULLIVAN: AND WHAT WE ARE TRYING TO DO IS CREATE
10:41AM 17 A SEQUENCE, WHEREBY WE CAN SETTLE SOME THINGS NOW AND STILL
10:41AM 18 LEAVE PROTECTABILITY AND SUBSTANTIAL SIMILARITY OF PRESENTABLE
10:41AM 19 ELEMENTS FOR THE JURY.

10:41AM 20 SO MR. VAN NEST, I'M SURE WILL WANT TO POINT OUT THAT HASH
10:42AM 21 TAGS PRE-EXISTED CISCO AND SO FORTH, BUT WE DON'T WANT TO
10:42AM 22 BEGRUDGE ARISTA THE CHANCE TO TALK ABOUT HOW HASH TAGS ARE UN
10:42AM 23 PROTECTABLE

10:42AM 24 THE COURT: BUT THIS IS A DECISION I'M GOING TO MAKE
10:42AM 25 ON WHETHER IT'S PROTECTABLE OR NOT.

10:42AM 1 MS. SULLIVAN: YOU ARE ABSOLUTELY GOING TO MAKE THAT
10:42AM 2 DECISION.

10:42AM 3 IT'S GOING TO BE REFLECTED IN YOUR JURY INSTRUCTIONS AND
10:42AM 4 IT'S A LEGAL QUESTION, PROTECTABILITY IS A LEGAL QUESTION, BUT
10:42AM 5 THE JURY WILL DETERMINE SIMILARITY BASED ON YOUR LEGAL
10:42AM 6 GUIDANCE.

10:42AM 7 SO YOUR HONOR, I WANT TO BE VERY CLEAR, YOU CAN RULE FOR US
10:42AM 8 THAT ARISTA COPIED ON SUMMARY JUDGEMENT NOW, AND ARISTA CAN
10:42AM 9 STILL COME BACK LATER AND SAY TO THE JURY, WELL, WE DIDN'T COPY
10:42AM 10 IT EXACTLY, OR WE CHANGED IT ENOUGH THAT IT'S NOT SUBSTANTIALLY
10:42AM 11 SIMILAR, OR WE PUT IT IN THIS CONTEXT THAT MEANS IT DIDN'T HAVE
10:42AM 12 INTRINSIC SIMILARITY.

10:42AM 13 ALL OF THAT IS FOR LATER, BUT YOU SHOULDN'T LET ARISTA'S
10:42AM 14 OBJECTIONS TO OUR VERBATIM COPYING POINTS HERE STAND IN THE WAY
10:43AM 15 OF YOUR COPYING DECISIONS.

10:43AM 16 YOUR HONOR, I HAVE DONE THE MODES AND PROMPTS, HELP
10:43AM 17 DESCRIPTIONS, TECHNICAL DOCUMENTS ON SLIDE 39 AGAIN, THIS IS
10:43AM 18 STRAIGHTFORWARD.

10:43AM 19 WE HAVE REPRINTED ON SLIDE 39, A NICE EXAMPLE OF COPYING
10:43AM 20 EVEN THE TYPOS. MR. ULLAL HAS ADMITTED THIS IS USER
10:43AM 21 DOCUMENTATION COPIED. EACH SYSTEM STATUS MESSAGES HAVE, THEY
10:43AM 22 COPIED IT RIGHT DOWN TO THE TYPOS.

10:43AM 23 SO YOUR HONOR, WE GIVE YOU ANOTHER EXAMPLE ON SLIDE 40.
10:43AM 24 BUT TO CONCLUDE AT THE END ON SLIDE 41, YOUR HONOR, AND THE
10:43AM 25 REASON WHY I THINK THE BUILDING BLOCKS ARE SO IMPORTANT, WE ARE

10:43AM 1 NOT JUST TALKING ABOUT THE 508 COPIED COMMAND EXPRESSIONS, WE
10:43AM 2 ARE TALKING ABOUT ALL THE OTHER FIVE FEATURES THAT WE HAVE JUST
10:43AM 3 GONE OVER, THE SCREEN OUTPUTS, THE COMMAND EXPRESSIONS, THE
10:43AM 4 HIERARCHIES, HELPDESC SCREENS, TECHNICAL DOCUMENTS.

10:43AM 5 THERE IS NO OTHER COMPETITOR THAT ARISTA HAS SHOWN USES ANY
10:43AM 6 OF THOSE THINGS IN A VERBATIM COPIED WAY. THEY WILL WANT TO
10:44AM 7 TELL YOU THAT OTHER COMPETITORS MAY USE ONE OR ANOTHER OF THE
10:44AM 8 COMMAND EXPRESSIONS. BUT THERE'S NO ALLEGATION THAT ANYONE HAS
10:44AM 9 COPIED THE WHOLE LOOK AND FEEL OF THE CLI AS ARISTA HAS DONE.

10:44AM 10 SO YOUR HONOR, THAT'S REALLY, IN A NUT SHELL, OUR ARGUMENT
10:44AM 11 ON COPYING. AND AGAIN, I APOLOGIZE FOR THE ERROR IN THE PRIOR
10:44AM 12 DRAFT ORDER. WE WILL BE VERY HAPPY TO SUBMIT A CORRECTED ORDER
10:44AM 13 TO THE COURT. ALL WE WANT YOU TO DO IS SAY, I FIND ON SUMMARY
10:44AM 14 JUDGEMENT, THAT ARISTA HAS VERBATIM COPIED CISCO'S CLI
10:44AM 15 INSOFAR -- HAS COPIED CISCO'S CLI INSOFAR AS ITS X, Y, Z.

10:44AM 16 THE COURT: THE ELEMENTS.

10:44AM 17 MS. SULLIVAN: INSOFAR AS THEY ARE VERBATIM.

10:44AM 18 THE COURT: OKAY. AND YOU WANT THE SIX CATEGORIES.

10:44AM 19 MS. SULLIVAN: AND THAT LEAVES FOR LATER, OUR
10:44AM 20 DECISION OF WHICH WERE VERBATIM COPIED, AND WE CAN WIN ON LATER
10:44AM 21 IF SOME OF THEM WARRANT.

10:44AM 22 BUT WE BELIEVE WE HAVE SHOWN YOU AMPLE EVIDENCE THAT IT'S
10:45AM 23 NOT A COSMIC ACCIDENT, IT'S NOT A COINCIDENCE, THEY SET OUT TO
10:45AM 24 COPY, THEIR CTO SAID THEY SLAVISHLY COPIED EVEN THE SILLY BITS,
10:45AM 25 THEIR TECHNICAL DOCUMENTS COPIED EVEN THE TYPOS. SO

10:45AM 1 YOUR HONOR, WE REALLY SHOULDN'T BE HERE ON COPYING. THIS
10:45AM 2 SHOULD BE A CASE REALLY ON WHICH ARISTA JUST ADMITS THE COPYING
10:45AM 3 AND WE GO TO TOWN ON WHETHER IT WAS ALLOWED TO COPY. THAT
10:45AM 4 REALLY IS WHAT WE SHOULD BE DOING.

10:45AM 5 SO YOUR HONOR, THAT CONCLUDES MY REMARKS ON ORIGINALITY AND
10:45AM 6 COPYING. I CAN ADDRESS FAIR USE BRIEFLY.

10:45AM 7 THE COURT: SO I REALLY FEEL THIS IS, THERE ARE
10:45AM 8 CONTESTED ISSUES OF FACT HERE. WHAT I NEED TO DO IS AT 11, I'M
10:45AM 9 GOING TO BREAK BRIEFLY TO DO A CASE MANAGEMENT CONFERENCE, LET
10:45AM 10 ALL OF YOU TAKE A BREAK AND COME BACK.

10:45AM 11 BUT I'M RUNNING UP AGAINST A DEADLINE OF MY OWN, AND I WANT
10:45AM 12 TO GIVE ARISTA EQUAL TIME TO PRESENT. AND I HAVE NOT HEARD --
10:45AM 13 SO I'M NOT QUITE SURE THERE'S A LOT IN MR. VAN NEST'S MOTION AS
10:45AM 14 WELL, AND YOU HAVEN'T GOTTEN TO THAT EITHER.

10:46AM 15 SO I'M A LITTLE CONCERNED ABOUT TIME.

10:46AM 16 MS. SULLIVAN: I UNDERSTAND COMPLETELY. COULD I DO
10:46AM 17 FAIR USE IN A VERY BRIEF WAY, YOUR HONOR?

10:46AM 18 THE COURT: YES, ABSOLUTELY.

10:46AM 19 MS. SULLIVAN: IF YOU TURN TO SLIDE 44, I CAN'T PUT
10:46AM 20 THIS ON THE SCREEN BECAUSE IT'S -- IT CONTAINS CONFIDENTIAL
10:46AM 21 INFORMATION. WE WILL LEAVE THE SCREEN DARK FOR NOW.

10:46AM 22 THE COURT: OKAY. I HAVE IT IN FRONT ME.

10:46AM 23 MS. SULLIVAN: YOUR HONOR, FACTOR ONE, FAIR USE HAS
10:46AM 24 THESE WELL ESTABLISHED HELPFUL FACTORS.

10:46AM 25 FIRST IS NATURE OF THE USE. THIS IS A STRAIGHT CASE OF

1 HEAD-TO-HEAD COMPETITION. THAT'S NOT A CASE OF CRITICISM,
2 COMMENTARY, RESEARCH, SCHOLARSHIP, PARODY, THE KINDS OF THINGS
3 THAT CONGRESS MEANT WHEN IT CREATED THE FAIR USE DEFENSE.

4 THIS IS CLASSIC VERBATIM COPYING TO TAKE OUR CUSTOMERS AWAY
5 ON THE SAME PRODUCT LINE AS ARISTA ADMITS IN THESE PRIVILEGED
6 DOCUMENTS, CONFIDENTIAL DOCUMENTS THAT ARE IN FRONT OF YOU.

7 SECOND, ON FACTOR TWO, THE NATURE OF THE USE. I'M SORRY,
8 THE NATURE OF THE WORK, EXCUSE ME. FIRST IS THE USE,
9 COMPETITION, NOT TRANSFORMATION.

10 AND BY THE WAY, YOUR HONOR, COULD I PAUSE ON FACTOR ONE
11 JUST FOR ONE MINUTE, BECAUSE I KNOW THAT ARISTA SOMETIMES
12 ARGUES WELL, OF COURSE WE'VE MADE TRANSFORMATIVE USE OF CISCO'S
13 CLI, WE HAVE A DIFFERENT SET OF SWITCHES THAT WE INVENTED THE
14 HARDWARE FOR. AND THEY HAVE LOTS OF ADVANTAGES. THEY HAVE
15 LOWER LATENCY AND HIGHER SPEED AND ALL THAT. AND THEREFORE
16 WE'VE TRANSFORMED THE CLI.

17 YOUR HONOR, WITH RESPECT, YOU MUST REJECT THAT ARGUMENT.
18 THAT'S LIKE SAYING WELL, THE IPAD HAS BETTER FUNCTIONALITY THAN
19 THE KINDLE. BUT IF I PUT CHARLES DICKENS', *TALE OF TWO CITIES*
20 ON MY KINDLE AND THEN SOMEBODY COMES ALONG AND COPIES IT AND
21 PUTS IT ON THE IPAD, IT'S NOT A TRANSFORMATIVE USE TO PUT THE
22 EXACT SAME WORDS THAT WERE ON ONE DEVICE TO ANOTHER DEVICE.
23 THAT IS NOT WHAT TRANSFORMATION MEANS. TRANSFORMATION MEANS
24 YOU CHANGE THE TEXT OF THE COPIED MATERIAL IN A WAY THAT
25 CHANGED IT. AND THEY CAN'T DO THAT HERE, SO THERE'S NO

1 TRANSFORMATIVE USE.

2 ON THE SECOND FACTOR, YOUR HONOR, WE WILL HAVE A DEBATE
3 LATER IN THE CASE OVER WHETHER THERE WAS AN INDUSTRY STANDARD,
4 THAT THE NATURE OF OUR WORK COULDN'T HAVE BEEN CREATIVE OR
5 PROPRIETARY BECAUSE IT WAS AN INDUSTRY STANDARD.

6 YOUR HONOR, WE HAVE ARISTA ADMISSIONS, AND I CAN SHOW YOU
7 ONE THAT'S PUBLIC ON PAGE 48, SLIDE 48. THIS IS NOT AN
8 INDUSTRY STANDARD CASE. THIS IS NOT A CASE IN WHICH ANY
9 STANDARD SETTING BODY HAS EVER SAID THAT YOU NEED TO USE OUR
10 CLI AS AN INDUSTRY STANDARD. IT JUST ISN'T.

11 WHAT INDUSTRY STANDARD MEANS IN THIS CASE, TAKE IT FROM
12 MR. LINCOLN DALE, ARISTA'S DISTINGUISHED ENGINEER, FORMER CISCO
13 EMPLOYEE, IN A PUBLIC PRESENTATION. HE SAID, WHEN WE SAY
14 INDUSTRY STANDARD, WHEN WE SAY THAT OFF SWITCHES RUN AT
15 INDUSTRY STANDARD CLI, I GUESS THAT'S MY JOKE FOR SAYING IT'S
16 THE SAME AS IOS. IOS IS CISCO'S PROPRIETARY SYSTEM.

17 SO YOUR HONOR, WHEN IT COMES TO THE NATURE OF THE WORK
18 THIS, THIS IS OUR CREATIVE PROPRIETARY WORK, IT'S NOT AN
19 INDUSTRY STANDARD, JUST BECAUSE IT'S POPULAR DOESN'T MEAN THAT
20 IT BECOMES AN INDUSTRY STANDARD.

21 THE FEDERAL CIRCUIT WAS VERY CLEAR ON THAT IN ORACLE V.
22 GOOGLE CITING THE PRACTICAL MATTERSON CASE IN WHICH THE
23 NINTH CIRCUIT SAID JUST BECAUSE SOMETHING IS COMMONLY USED
24 DOESN'T MEAN IT'S AN INDUSTRY STANDARD.

25 THE COURT: BUT OF COURSE FAIR USE WENT TO THE JURY

10:49AM 1 IN THAT CASE.

10:49AM 2 MS. SULLIVAN: THAT'S TRUE, YOUR HONOR. I CAN'T DENY
10:49AM 3 THAT FAIR USE USUALLY GOES TO THE JURY, BUT THIS IS A RARE CASE
10:49AM 4 --

10:49AM 5 THE COURT: IT PROBABLY WILL HERE TOO.

10:49AM 6 MS. SULLIVAN: WELL, I UNDERSTAND, YOUR HONOR. IF I
10:49AM 7 CAN JUST TRY MY BEST CASE WITH YOU.

10:50AM 8 THE COURT: OF COURSE. I APPRECIATE THAT.

10:50AM 9 MS. SULLIVAN: AND AGAIN, I WANT TO GO BACK TO SLIDE
10:50AM 10 49.

10:50AM 11 WE TALKED ABOUT MR. GIANCARLO. HE WAS THE EXECUTIVE AT
10:50AM 12 CISCO WHO HELPED SUE HUAWAI FOR MISAPPROPRIATING CISCO CLI.

10:50AM 13 AND REMEMBER, WE HAVE ALREADY GONE OVER THIS SLIDE, BUT
10:50AM 14 REMEMBER WHAT HE SAID ABOUT OUR CLI, THIS IS GOING TO FACTOR 3,
10:50AM 15 FACTOR 3 IS THE SUBSTANTIALITY OF THE USE. QUALITATIVELY,
10:50AM 16 QUANTITATIVELY, IS THE USE IMPORTANT?

10:50AM 17 AND WHAT HE SAID IS ESSENTIALLY THAT CLI WAS OUR CROWN
10:50AM 18 JEWELS. IT IS ONE OF THE COMPANY'S MOST VALUABLE ASSETS AND A
10:50AM 19 CRITICAL COMPONENT OF CISCO'S BUSINESS.

10:50AM 20 VERY HARD TO SEE HOW A CURRENT MEMBER OF ARISTA'S BOARD IS
10:50AM 21 NOT ADMITTING THAT THE QUALITATIVE AND QUANTITATIVE NATURE OF
10:50AM 22 THE COPING IS SIGNIFICANT.

10:50AM 23 WE POINT YOU ON SLIDES 50 AND 51 TO SOME OTHER IMPORTANT
10:50AM 24 ARISTA ADMISSIONS ABOUT THE QUANTITY OF THE COPYING.
10:50AM 25 ESPECIALLY SLIDE 50 AS TO THE QUANTITY OF THE COPING. SO WE

1 THINK ON FACTOR THREE, SUBSTANTIALITY IN THE QUANTITY AND
2 QUALITY OF THE COPYING IS INCOMPATIBLE WITH A FAIR USE DEFENSE.

3 THIS IS NOT COPYING SNIPPETS, IT'S COPYING WHOLE BOX AND
4 DICE, WHOLE NINE YARDS, WHOLE THING, SEAMLESS, RIGHT OUT OF
5 THE -- AND THEN THE LAST FACTOR, YOUR HONOR, IS MARKET IMPACT.

6 SO AS TO FACTOR 4 ON SLIDE 51, THE MARKET IMPACT, YOU WILL
7 DECIDE LATER AND THE JURY WILL DECIDE LATER WHAT THE REMEDIES
8 ARE, SO WE WILL GO BACK TO MARKET IMPACT.

9 BUT WHERE THE VERY PURPOSE OF COPYING OUR CLI IS TO TAKE
10 OUR CUSTOMERS AWAY AND STEER THEM OVER TO ARISTA BECAUSE THEY
11 CAN HAVE A SEAMLESS TRANSITION BECAUSE THEY CAN USE THE EXACT
12 SAME WORDS AND PHRASES WHEN THEIR SYSTEM ADMINISTRATORS
13 INTERACT WITH THEIR SWITCHES, THAT'S THE KIND OF MARKET IMPACT
14 THAT PRECLUDES A FAIR USE DEFENSE.

15 I HAD THE SAME REACTION AS YOUR HONOR, I THOUGHT FAIR USE
16 ALWAYS GOES TO THE JURY. AND THE MORE WE LOOKED AT THE
17 UNDISPUTED EVIDENCE, WE THOUGHT YOUR HONOR, THERE IS NO WAY
18 THIS IS A FAIR USE CASE. THEY CAN MAYBE BRING THEIR MERGER AND
19 THEIR SANS AFFAIR AND FUNCTIONALITY DEFENSES AND TRY TO SAY
20 THIS ISN'T ABOUT WORDS, THIS IS ABOUT KNOBS, AS THEY LIKE TO
21 CALL OUR EXPRESSIONS, AND YOUR HONOR, WE GIVE YOU THE SLIDE ON
22 PAGE 52 THAT JUST TRIES TO COMPARE IT TO ANOTHER RECENT FAIR
23 USE, AND YOU KNOW THE DIFFERENCE.

24 THE COURT: I DO.

25 MS. SULLIVAN: THIS IS NOT A CASE IN WHICH YOU HAVE

10:52AM 1 TWO DIFFERENT MARKETS ON FREWARE.

10:52AM 2 THE COURT: BUT YOU KNOW, THERE'S A VAST DIFFERENCE
10:52AM 3 BETWEEN A WINNING CASE ON FAIR USE AND ONE THAT PASSES THROUGH
10:52AM 4 SUMMARY JUDGEMENT. I'M JUST LOOKING TO SEE WHETHER IT PASSES
10:52AM 5 THROUGH SUMMARY JUDGEMENT AND THEN YOU CAN BOTH WORK YOUR MAGIC
10:52AM 6 IN FRONT OF THE JURY.

10:52AM 7 MS. SULLIVAN: ALL RIGHT. I UNDERSTAND.

10:52AM 8 THANK YOU, YOUR HONOR. YOU HAVE BEEN VERY GRACIOUS WITH
10:52AM 9 YOUR TIME AND I APPRECIATE ALL THE TIME YOU GAVE US TO LAY OUR
10:52AM 10 CASE.

10:52AM 11 THE COURT: ABSOLUTELY.

10:52AM 12 MR. VAN NEST, YOU DO HAVE AN AMOUNT OF TIME AVAILABLE TO
10:52AM 13 YOU. LET ME BE -- BEFORE YOU START, I HAVE ONE CASE
10:53AM 14 MANAGEMENT, I WANT TO GIVE ME COURT REPORTER A BREAK. SO I
10:53AM 15 THINK -- ARE ALL THE PARTIES HERE ON THE CASE MANAGEMENT
10:53AM 16 CONFERENCE FOR VILLA?

10:53AM 17 (OFF-THE-RECORD DISCUSSION.)

11:15AM 18 (WHEREUPON A RECESS WAS TAKEN.)

11:15AM 19 MR. FERRALL: YOUR HONOR, AND I THINK WE ARE GOOD.

11:16AM 20 BRIAN FERRALL ON BEHALF OF ARISTA. GOOD MORNING.

11:16AM 21 THE COURT: GOOD MORNING.

11:16AM 22 MR. FERRALL: AND YOUR HONOR, I WOULD LIKE TO START
11:16AM 23 WITH THE SAME QUESTION THE COURT POSED AT THE BEGINNING WHICH
11:16AM 24 IS WHAT EXACTLY IS IT THAT CISCO IS ASKING FOR IN THIS MOTION
11:16AM 25 AND WHAT ARE THE CONSEQUENCES OF IT.

11:16AM 1 IF I COULD HAVE SLIDE 63 TO START. SO 64 YOUR HONOR, IF
11:16AM 2 YOUR HONOR HAS THE DECK, I JUST WANT TO RESPOND ON SOME GENERAL
11:16AM 3 POINTS.

11:16AM 4 SO THIS IS CISCO'S NOTICE OF MOTION, AND LIKE YOUR HONOR,
11:16AM 5 WE TAKE CISCO AT ITS WORD WHEN IT SAYS THIS IS THE RELIEF IT
11:17AM 6 SEEKS, THAT'S WHAT WE RESPOND TO, AND THAT'S WHAT WE DID
11:17AM 7 RESPOND TO. AND THE REQUEST IS FOR A DECLARATION THAT CISCO
11:17AM 8 OWNS A VALID COPYRIGHT IN CISCO CLI.

11:17AM 9 IT IS A REQUEST THAT STRUCK US AS ODD BECAUSE THIS CASE HAS
11:17AM 10 NEVER BEEN PROSECUTED AS A CLAIM IN THE CISCO CLI AND FOR GOOD
11:17AM 11 REASON, YOUR HONOR. THERE'S NOT A COPYRIGHT REGISTRATION ON
11:17AM 12 THE CISCO CLI.

11:17AM 13 IN FACT, THEIR EXPERT, CISCO'S EXPERT HAS NEVER COMPARED
11:17AM 14 THE CISCO CLI WITH ARISTA'S CLI TO TRY TO FIND THE EXTENT OF
11:17AM 15 THE SIMILARITIES.

11:17AM 16 THIS CASE HAS BEEN PROSECUTED FROM THE VERY BEGINNING AS A
11:17AM 17 SET OF SPECIFIC COMMANDS OR OTHER ELEMENTS THAT ARE ABSTRACTED
11:18AM 18 THAT ARE NONLITERAL ELEMENTS FROM WHAT IS ULTIMATELY THE LEGAL
11:18AM 19 RIGHT THAT CISCO HAS, AND THAT COMES FROM A REGISTRATION,
11:18AM 20 ACTUALLY IT COMES FROM 26 REGISTRATIONS OVER THE COURSE OF SOME
11:18AM 21 15 OR MORE YEARS.

11:18AM 22 SO IF YOU START WITH WHAT THEIR RIGHTS DERIVE FROM,
11:18AM 23 REGISTRATION AND SOFTWARE, YOU ARE NOT GOING TO FIND A
11:18AM 24 REGISTERED WORK THAT'S CALLED THE CISCO CLI.

11:18AM 25 SO THE IMMEDIATE ANSWER TO YOUR QUESTION IS WHAT DOES THIS

11:18AM 1 ORDER GET YOU? IT DOESN'T GET US ANYTHING TO NARROW THIS CASE.
11:18AM 2 AN ORDER THAT THE CLI IS ORIGINAL IS AN AMORPHOUS ORDER THAT
11:18AM 3 WILL NOT RESOLVE ANY OF THE STEPS THAT THE COURT HAS TO TAKE
11:18AM 4 FOR FILTRATION OR ANALYTIC DISSECTION, AS THE NINTH CIRCUIT
11:18AM 5 CALLS IT, AND IT'S NOT GOING TO RESOLVE ISSUES FOR THE JURY.

11:18AM 6 SO LET ME TURN TO ANALYTIC DISSECTION. THAT IS -- THAT IS
11:19AM 7 WHERE THE QUESTIONS OF ORIGINALITY COME TO PLAY. AND ONE THING
11:19AM 8 ALL OF THE PARTIES AGREE UPON, ONE OF THE FEW THINGS THAT
11:19AM 9 EVERYONE AGREES UPON IS THAT ANALYTIC DISSECTION AND FILTRATION
11:19AM 10 IS A MIXED QUESTION OF LAW AND FACT, THAT'S THE HARPER HOUSE
11:19AM 11 CASE THAT WAS DISCUSSED AT LENGTH THE LAST TIME WE WERE HERE.

11:19AM 12 THE COURT: BUT THE REAL QUESTION FOR ME, I ACCEPT
11:19AM 13 THAT, BUT IS IT A MIXED QUESTION OF LAW IN FACT FOR THE JUDGE
11:19AM 14 OR IS THERE A JURY ASPECT TO IT? AND THAT I'M NOT CLEAR ON.

11:19AM 15 MR. FERRALL: FOR ISSUES OF COPYRIGHTABILITY
11:19AM 16 INCLUDING ORIGINALITY, THAT IS FOR THE COURT. BUT IT'S FOR THE
11:19AM 17 COURT SITTING AS A FINDER OF FACT.

11:19AM 18 THE COURT: YES.

11:19AM 19 MR. FERRALL: NOT RESOLVING ON THE RULE 56 STANDARD
11:19AM 20 OF NO DISPUTED FACT. THAT'S AN IMPORTANT DIFFERENCE.

11:20AM 21 AND ALL OF THE CASES CALL IT BROWN BAG, APPLE, YOU NAME IT,
11:20AM 22 THEY ALL TALK ABOUT THE EXTRINSIC TEST WHEREBY EXPERTS TALK
11:20AM 23 ABOUT WHAT IS OR IS NOT ORIGINAL, WHAT IS OR IS NOT
11:20AM 24 PROTECTABLE. AND THE COURT SITTING AS AN ARBITRATOR OF THOSE
11:20AM 25 FACTS AND THAT TESTIMONY MAKES DETERMINATIONS ABOUT WHAT IS THE

1 PROTECTABLE EXPRESSION IN THE WORK. REMEMBER THE WORK IS A
2 REGISTERED OPERATING SYSTEM, AND WHAT IS NOT PROTECTABLE.

3 SO THAT WHEN THE JURY HEARS THE CASE, THE JURY KNOWS --
4 THE COURT: YOU ARE DEFINING THE WORK DIFFERENTLY
5 THAN CISCO IS.

6 MR. FERRALL: WELL, I DON'T THINK THERE'S ANY DISPUTE
7 THAT THE WORK THAT'S BEEN REGISTERED WITH THE COPYRIGHT OFFICE
8 IS SOFTWARE AND ASSOCIATED DOCUMENTATION.

9 SO THERE IS DOCUMENTATION THAT WAS PART OF EACH
10 REGISTRATION ALSO, BUT IT'S SOFTWARE. AND THERE'S NOT A
11 REGISTERED WORK IN COMMANDS, THERE'S NOT A REGISTERED WORK
12 IN -- THOSE ARE NONLITERAL ELEMENTS OF THE REGISTERED WORK.
13 AND I THINK CISCO AGREES WITH ME ON THAT.

14 IN FACT, I THINK YOU COULD SEARCH IN WHAT IS ADMITTEDLY AN
15 EXTREMELY VOLUMINOUS SUMMARY JUDGEMENT RECORD, BUT YOU ARE NOT
16 GOING TO FIND ANY CITATION IN THERE TO A PIECE OF SOFTWARE.
17 YOU ARE NOT GOING TO FIND CITES TO LINES OF SOFTWARE THAT
18 RECITES 508 COMMANDS. OR THAT -- OR THERE'S NOT GOING TO BE
19 ANY REFERENCE TO WHERE THE HIERARCHIES APPEAR IN THE SOFTWARE.
20 THESE ARE ABSTRACTIONS, NONLITERAL ELEMENTS THAT ARE TAKEN FROM
21 THE REGISTERED WORKS.

22 SO THE ULTIMATELY WHAT CISCO IS ASKING YOU HERE IS EITHER
23 TO ISSUE AN ORDER ABOUT THE CISCO CLI WHICH IS TRULY NOT EVEN
24 AT ISSUE IN THE CASE, OR TO RESOLVE THESE QUESTIONS OF LAW AND
25 FACT, MIXED QUESTIONS OF FACT WHICH ARE APPROPRIATE NOT FOR

11:22AM 1 SUMMARY JUDGEMENT, BUT AT A LATER STAGE IN THE CASE WHEN THE
11:22AM 2 COURT EVALUATES THE EXPERT TESTIMONY AND SO FORTH.

11:22AM 3 AND I'M GOING TO GO THROUGH SOME OF THE EVIDENCE ABOUT WHY
11:22AM 4 THERE ARE DISPUTES OF FACT OF ORIGINALITY FOR CERTAIN --

11:22AM 5 THE COURT: THAT'S WHY I SPENT SOME TIME WITH
11:22AM 6 MS. SULLIVAN ABOUT DEFINING WHAT IT IS THEY WANTED ME TO
11:22AM 7 CONSIDER.

11:22AM 8 AND I DON'T THINK IT'S A HARD JOB ON ORIGINALITY, IF I'M
11:22AM 9 LOOKING AT WHAT IS DEFINED BY CISCO AS CISCO'S CLI AS TO
11:22AM 10 WHETHER THAT AS A WHOLE ORIGINAL. BUT MY FOLLOW UP ON THAT
11:22AM 11 WAS, AND I AGREE WITH YOU MR. FERRALL, I DON'T THINK THAT MOVES
11:22AM 12 THE BALL DOWN THE FIELD VERY FAR THOUGH.

11:22AM 13 I JUST DON'T THINK THAT DOES MUCH BECAUSE I DON'T THINK IT
11:22AM 14 REALLY SAYS ANYTHING ABOUT COPYRIGHT PROTECTION OR COPYRIGHT
11:22AM 15 LIABILITY.

11:23AM 16 MR. FERRALL: IT DOES NOT.

11:23AM 17 IF WE COULD LOOK AT SLIDE --

11:23AM 18 THE COURT: AND SO I DON'T EVEN THINK IT HURTS YOU TO
11:23AM 19 LOSE ON THAT ISSUE IS ANOTHER WAY OF SAYING IT, I SUPPOSE. I
11:23AM 20 JUST THINK IT'S -- IT'S THE -- IT'S THE FEIST CASE IT'S THE
11:23AM 21 DIRECTORY.

11:23AM 22 AND YOU KNOW, OF MAKING THAT THRESHOLD FINDING. BUT YOU
11:23AM 23 KNOW, THE WORK IS DONE DOWN IN THE WEEDS LOOKING AT THE
11:23AM 24 INDIVIDUAL FEATURES OR THE ELEMENTS.

11:23AM 25 MR. FERRALL: YOU ARE ABSOLUTELY RIGHT YOUR HONOR,

11:23AM 1 ALTHOUGH THERE IS THE PREJUDICIAL ASPECT OF THIS AND I THINK
11:23AM 2 THAT MAY BE WHAT'S BEHIND THIS MOTION IS GETTING A SOUND BITE
11:23AM 3 THAT SAYS THIS IS ORIGINAL OR THIS WAS COPIED.

11:23AM 4 EVEN THOUGH AT THE END OF THE DAY IT'S NOT WHAT THE JURY IS
11:23AM 5 GOING TO CONSIDER, IT'S A SOUND BYTE. AND I'M GOING TO SUBMIT
11:23AM 6 AND SHOWY A LEGALLY ERRONEOUS SOUND BYTE BASED UPON THE
11:23AM 7 EVIDENCE.

11:23AM 8 SO LET'S LOOK AT SLIDE 67. SO WE TOOK SOME OF THE
11:24AM 9 TESTIMONY OR THE EVIDENCE FROM PROFESSOR BLACK, OUR EXPERT ON
11:24AM 10 COPYRIGHT, SOME OF THE THINGS HE OBSERVED ABOUT THE CISCO'S
11:24AM 11 CLI, AMONG OTHER THINGS, I SAID IT IS NOT A REGISTERED WORK.

11:24AM 12 PRESUMABLY, THE CLI WOULD ALSO CONSIST OF HOWEVER MANY
11:24AM 13 LINES OF CODE IN EACH OF THESE 26 DIFFERENT VERSIONS OF
11:24AM 14 SOFTWARE THAT IMPLEMENT THE INTERFACE.

11:24AM 15 NOW THOSE HAVE NEVER BEEN IDENTIFIED, NO ONE HAS EVER PUT
11:24AM 16 FORTH EVIDENCE ABOUT THOSE, THOSE ARE UNKNOWN, AT LEAST ON THIS
11:24AM 17 RECORD.

11:24AM 18 DR. BLACK, ACTUALLY THIS IS CISCO'S OWN ESTIMATION THAT
11:24AM 19 THERE'S AT LEAST 16,000 DIFFERENT COMMANDS IN ITS OPERATING
11:24AM 20 SYSTEM. ACTUALLY, DR. BLACK'S ESTIMATE IS IF YOU COUNT THEM
11:24AM 21 THE WAY CISCO HAS COUNTED THEM FOR THIS CASE, THERE MAY BE OVER
11:24AM 22 A HUNDRED THOUSAND COMMANDS. BUT REGARDLESS, ORDERS OF
11:25AM 23 MAGNITUDE MORE THAN WHAT WAS ASSERTED IN THIS CASE. THERE ARE
11:25AM 24 70 MODES, FOUR ASSERTED HERE, BUT IT'S REALLY EIGHT.

11:25AM 25 70,000 COMMAND RESPONSES ARE AVAILABLE THROUGH IOS, THROUGH

11:25AM 1 THE VARIOUS RESPONSES YOU CAN GET FROM ALL OF THE DIFFERENT
11:25AM 2 SHOW COMMANDS.

11:25AM 3 AND THEY HAVE ASSERTED 37. THEY SAY NOW THAT THEY HAVE
11:25AM 4 ASSERTED 200.

11:25AM 5 REGARDLESS, WE ARE MANY ORDERS OF MAGNITUDE. SO AGAIN,
11:25AM 6 WHAT IS THIS ORDER, NEITHER THE COURT, CISCO HASN'T TRIED TO
11:25AM 7 TALK ABOUT THE ORIGINALITY OF 97 PERCENT OF ITS CLI. AND IF IT
11:25AM 8 DID, MAYBE THERE WERE PARTS WE WOULD CONCEDE ARE ORIGINAL OR
11:25AM 9 LARGE PARTS OF IT.

11:25AM 10 BUT THEY ARE NOT AT ISSUE IN THIS CASE, AND SO A
11:25AM 11 DECLARATION THEY ARE SEEKING IS IRRELEVANT. AND AS I SAID, I
11:26AM 12 THINK PREJUDICIAL BECAUSE IT'S A SOUND BYTE, NOT SOMETHING
11:26AM 13 THAT'S GOING TO ADVANCE THE CASE.

11:26AM 14 YOUR HONOR TALKED ABOUT FEIST, AND THAT WAS WHAT I WAS
11:26AM 15 GOING TO REFER TO NEXT IN GENERAL COMMENTS, BECAUSE WHAT'S
11:26AM 16 IMPORTANT TO UNDERSTAND, AGAIN GOING BACK TO WHERE THE LEGAL
11:26AM 17 RIGHTS COME FROM, A REGISTERED WORK AT THE COPYRIGHT OFFICE OR
11:26AM 18 26 REGISTERED WORKS AT THE COPYRIGHT OFFICE.

11:26AM 19 WHAT FEIST SAYS, AMONG OTHER THINGS, IS THAT THE COPYRIGHT
11:26AM 20 REGISTRATION DOES NOT GIVE YOU, AND THIS IS ONLY LOGICAL, A
11:26AM 21 COPYRIGHT REGISTRATION DOES NOT GIVE YOU EXCLUSIVE RIGHTS TO
11:26AM 22 EACH AND EVERY ELEMENT.

11:26AM 23 THE QUOTE IS, MERE FACT, THE MERE FACT THAT A WORK IS
11:26AM 24 COPYRIGHTED DOES NOT MEAN EVERY ELEMENT IS PROTECTED.

11:26AM 25 THAT'S AT PAGE 348 OF THE FEIST DECISION. THAT'S WHY WE

11:26AM 1 HAVE ANALYTIC DISSECTION.

11:27AM 2 SO ALL OF WHAT MS. SULLIVAN REFERS TO AS THE SIX PILLARS OR
11:27AM 3 PYRAMID OF THEIR CLAIM, THOSE ARE ALL, AS I SAID, DIFFERENT
11:27AM 4 NONLITERAL ELEMENTS, THEY ALL MERIT ANALYSIS. YOU CANNOT
11:27AM 5 SIMPLY SAY, WELL WE HAVE A REGISTERED WORK IN THIS REGISTRATION
11:27AM 6 IN THIS VERSION OF SOFTWARE AND THEREFORE WE GET PROTECTION ON
11:27AM 7 EVERY ONE OF THEM.

11:27AM 8 THE COURT: SHE'S NOT ASKING FOR PROTECTION AT THIS
11:27AM 9 STAGE. SO THIS IS THE -- THE SHIFTING SANDS THAT I'M CONCERNED
11:27AM 10 ABOUT.

11:27AM 11 WHAT SHE REQUESTS IS SUMMARY ADJUDICATION OF A THRESHOLD
11:27AM 12 ISSUE IN THE CASE. AND IT IS ONE THAT HAS TO BE DETERMINED.

11:27AM 13 NOW YOU ARE SUGGESTING CISCO'S CLI IS NOTHING AND I WOULD
11:27AM 14 NEVER BE MAKING A FINDING ON CISCO'S CLI BECAUSE IT'S A
11:27AM 15 CONSTRUCT THAT HAS BEEN CREATED BY ATTORNEYS.

11:27AM 16 MR. FERRALL: RIGHT. I'M NOT SAYING IT'S NOTHING,
11:27AM 17 I'M SAYING IT'S NEVER BEEN DEFINED --

11:27AM 18 THE COURT: ITS BOUNDARIES ARE UNIQUE TO THIS
11:28AM 19 LITIGATION IS WHAT YOU ARE SAYING PERHAPS.

11:28AM 20 MR. FERRALL: RIGHT, EXACTLY.

11:28AM 21 SO I THINK THE WAY THE CONVERSATION WENT WITH MS. SULLIVAN
11:28AM 22 WAS, WELL, WHAT WE ARE TALKING ABOUT IS THE CLEAR PROTECTION
11:28AM 23 THAT WE GET FOR A COMBINATION OF ELEMENTS.

11:28AM 24 AND I JUST WANT TO TOUCH UPON THE LAW ON THAT AND THEN I'M
11:28AM 25 GOING TO START WALKING THROUGH SOME OF THE EVIDENCE.

1 THE REFERENCE WAS TO THE JOHNSON CONTROLS CASE. I THINK
2 THE LAW IS NOT AT ALL CISCO'S MS. SULLIVAN SAID, WELL JOHNSON
3 CONTROLS SAYS WE ABSOLUTELY GET PROTECTION FOR THE STRUCTURE,
4 SEQUENCE AND ORGANIZATION OF COMPUTER SOFTWARE.

5 WHAT JOHNSON CONTROLS SAYS IS COPYRIGHT MAY, MAY ATTACH TO
6 STRUCTURE, SEQUENCE AND ORGANIZATION IF THERE'S SOME ASPECT OF
7 THOSE ELEMENTS THAT IS EXPRESSIVE AND ORIGINAL AND MEETS THE
8 OTHER QUALIFICATIONS FOR PROTECTION.

9 WHAT THE NINTH CIRCUIT HAS CLARIFIED MUCH MORE RECENTLY, IF
10 WE COULD LOOK AT SLIDE 50. MORE RECENTLY IN THIS SATAVA V.
11 LOWRY CASE.

12 THE COURT: I KNOW THAT CASE.

13 MR. FERRALL: RIGHT.

14 THE COURT HELD THAT A COMBINATION OF UNPROTECTABLE ELEMENTS
15 IS ELIGIBLE FOR COPYRIGHT PROTECTION ONLY IF THOSE ELEMENTS ARE
16 NUMEROUS ENOUGH AND THEIR SELECTION AND ARRANGEMENT ORIGINAL
17 ENOUGH THAT THEIR COMBINATION CONSTITUTES AN ORIGINAL WORK OF
18 AUTHORSHIP.

19 THE COURT: WELL, NUMEROUS IS NOT GOING TO BE OUR
20 PROBLEM HERE.

21 MR. FERRALL: WELL NO, BUT IF YOU LOOK AT ALL OF THE
22 ELEMENTS, REMEMBER WE'VE TALKED AND MS. SULLIVAN HAS TALKED
23 ABOUT CISCO'S CLI, AN AMORPHOUS TERM.

24 THE COURT: I DON'T THINK IT'S AMORPHOUS, I THINK
25 IT'S CLEARLY DEFINED AND IT HAS BOUNDARIES.

11:30AM 1 THE QUESTION TO ME IS, ARE THOSE APPROPRIATE BOUNDARIES
11:30AM 2 FOUND IN THE REGISTRATION, EACH OF THE ELEMENTS MAY BE
11:30AM 3 PROTECTED THROUGH THESE 26 REGISTRATIONS. BUT THERE'S NO
11:30AM 4 REGISTRATION ON SOMETHING CALLED CISCO CLI.

11:30AM 5 MR. FERRALL: RIGHT.

11:30AM 6 I DON'T THINK IT'S EVEN -- I THINK THEIR DEFINITION IS NOT
11:30AM 7 EVEN, IS IT THE MODES OF EACH AND EVERY ONE OF THE VERSIONS OF
11:30AM 8 THE 26 REGISTRATIONS? IS IT EVERY COMMAND RESPONSE IN ALL OF
11:30AM 9 THOSE REGISTRATIONS OR ANY ONE OF THOSE REGISTRATIONS? I THINK
11:30AM 10 EVEN THEIR DEFINITION IN THEIR PROPOSED ORDER IS IMPOSSIBLY
11:30AM 11 VAGUE.

11:30AM 12 BUT REGARDLESS, THE POINT IS ON COMBINATION OF ELEMENTS AND
11:31AM 13 WE ARE GOING TO GET TO THIS WHEN WE START TALKING ABOUT COMMAND
11:31AM 14 WORDS, WE SUBMIT THAT IT'S UNDISPUTED THAT THERE'S ENORMOUS
11:31AM 15 AMOUNTS OF WHAT CISCO CLAIMS EXCLUSIVE RIGHTS THAT IT CANNOT
11:31AM 16 CLAIM EXCLUSIVE RIGHTS --

11:31AM 17 THE COURT: SO YOU ARE LEADING ME DOWN A PATH OF
11:31AM 18 DETERMINING ORIGINALITY AS TO EACH MINUTE FEATURE OR ELEMENT,
11:31AM 19 EACH OF THE 508 COMMAND LINES, EACH OF THE ACCUSED ELEMENTS
11:31AM 20 THROUGHOUT THIS THAT YOU ARE GOING TO WANT A DECISION ON
11:31AM 21 ORIGINALITY OF EACH PART.

11:31AM 22 AND I DON'T THINK THAT'S THE LAW. I THINK THAT COMES BACK
11:31AM 23 TO DETERMINE IF IT'S PROTECTABLE. BUT THEN IT'S GOING TO BE --
11:31AM 24 THAT'S GOING TO BE THE FILTRATION PROCESS. THAT'S WHY -- I SEE
11:31AM 25 THIS AS SOMETHING OF A GATEWAY ISSUE THAT AT THE HIGH LEVEL

11:31AM 1 THAT IT'S BEEN BRIEFED BY CISCO, IS -- I'M NOT SURE IT'S
11:31AM 2 ACTUALLY DISPUTABLE, I'M NOT SURE IT'S ACTUALLY WORTH MUCH.

11:32AM 3 YOU KNOW, SO I DON'T ACTUALLY THINK YOU LOSE EITHER WAY ON
11:32AM 4 THIS. I KNOW YOU DON'T WANT THE BAD PRESS, THAT'S NOT MY
11:32AM 5 CONCERN

11:32AM 6 MR. FERRALL: NO, BUT IT IS -- THE ELEMENT-BY-ELEMENT
11:32AM 7 ANALYSIS IS WHAT THE LAW REQUIRES, BUT NOT ONLY IS IT WHAT THE
11:32AM 8 LAW REQUIRES, BUT IT'S HOW CISCO HAS PROSECUTED THIS CASE.
11:32AM 9 THEY COULD HAVE SAID -- AND HERE'S THE PROOF, SLIDE 30.

11:32AM 10 SO CISCO COULD HAVE ALLEGED IN THIS CASE THAT THIS IS ALL
11:32AM 11 ABOUT PROTECTING A COMBINATION OF ALL OF THESE DIFFERENT
11:33AM 12 ELEMENTS. AND THAT COMBINATION IS WHAT WE HAVE EXCLUSIVE
11:33AM 13 RIGHTS IN.

11:33AM 14 NOW, OF COURSE THE CONSEQUENCES OF THAT IS THAT IF YOU OMIT
11:33AM 15 ONE OR TWO ELEMENTS OF THAT COMBINATION, WELL THEN YOU ARE NOT
11:33AM 16 USING THEIR COMBINATION, RIGHT.

11:33AM 17 SO THERE'S OBVIOUS REASONS THEY DIDN'T WANT TO GO DOWN THAT
11:33AM 18 PATH, ALTHOUGH THEY MAY BE TRYING TO BENEFIT FROM IT NOW. THEY
11:33AM 19 DIDN'T GO DOWN THAT PATH. INSTEAD, WHAT THEY WANTED TO DO IS
11:33AM 20 THEY WANTED TO SAY THAT ARISTA IS PREVENTED FROM USING EACH
11:33AM 21 COMMAND. THIS IS CISCO'S COUNSEL, ALMOST A YEAR AGO,
11:33AM 22 CLARIFYING ITS EACH AND EVERY ELEMENT. OKAY.

11:33AM 23 AND THAT'S WHAT PROMPTED THE WAY THE CASE HAS BEEN
11:33AM 24 LITIGATED SINCE THEN, OKAY.

11:33AM 25 THEY WANT TO BE ABLE TO PREVENT ARISTA, AND PRESUMABLY

1 OTHER COMPETITORS FROM USING SHOW MAC ADDRESS, SHOW INTERFACES,
2 THEY WANT TO PREVENT ARISTA AND COMPETITORS FROM USING ANY
3 COMBINATION OF COMMANDS THAT BEGIN WITH THE WORD SHOW.

4 MS. SULLIVAN ADMITTED SHOW WAS NOT ORIGINAL TO THEM, AND WE
5 HAVE UNDISPUTABLE PROOF THAT IT WAS NOT ONLY NOT ORIGINAL BUT
6 IT WAS COPIED FROM SOFTWARE MR. LOUGHEED USED FROM STANFORD
7 BEFORE HE CAME TO, THAT'S UNDISPUTED.

8 BUT CISCO WOULD HAVE THE COURT RULE THROUGH THIS CASE THAT
9 NO COMPETITOR CAN USE A COMBINATION OF SHOW AND VARIOUS
10 INDUSTRY STANDARD TERMS THAT FOLLOW THAT, ON AN INDIVIDUAL
11 BASIS TO MAKE IT AS FRUSTRATING AS POSSIBLE TO COMPETE WITH
12 THEM. THAT'S THE WAY THEY HAVE LITIGATED THE CASE.

13 THE COURT: BUT THE DETERMINATION OF EACH OF THOSE,
14 AND I DON'T KNOW, WE ADD THESE UP, WE START AT 508 AT MY BASE.
15 I DON'T FIND ANY OF THAT IN ANY OF THE CASES, ANYTHING THAT
16 MAMMOTH.

17 BUT AM I GOING TO HAVE AN EVIDENTIARY HEARING, A BENCH
18 TRIAL ON THIS?

19 MR. FERRALL: ON THE PROTECTABILITY OF THESE?

20 THE COURT: YES.

21 MR. FERRALL: I THINK THAT WHAT WE ARE GOING TO
22 PROPOSE, REMEMBER YOUR HONOR HAS SET A SCHEDULE FOR CONSIDERING
23 THE WAY FILTRATION SHOULD WORK IN THIS CASE. AND THAT'S GOING
24 TO BE FILED ON THE 15TH. AND WHAT WE ARE GOING TO PROPOSE ARE
25 SOME GENERAL CONCLUSIONS THAT WE THINK ARE GOING TO BE, IF NOT

11:35AM 1 UNDISPUTED, EASILY -- EASILY SUPPORTED OVERWHELMINGLY SUPPORTED
11:35AM 2 BY THE FACTS, SOME BROAD CONCLUSIONS ABOUT WHAT IS CLEARLY NOT
11:35AM 3 PROTECTABLE.

11:35AM 4 AND IT'S GOING TO BE THINGS THAT CLEARLY COME FROM INDUSTRY
11:35AM 5 STANDARDS THAT CLEARLY CISCO HAS NO EXCLUSIVE RIGHTS ON, AND
11:35AM 6 THERE WILL BE THINGS THAT ARE LEFT, WE ARE NOT GOING TO SAY
11:35AM 7 THAT FILTRATION ELIMINATES EVERYTHING IN THIS CASE, THAT'S A
11:36AM 8 DIFFERENT ARGUMENT RESERVED FOR ANOTHER TIME.

11:36AM 9 BUT WE ARE GOING TO PROVIDE, I THINK, A STRUCTURE THAT IS
11:36AM 10 WORKABLE, IS NOT GOING TO REQUIRE AN EVIDENTIARY HEARING ON
11:36AM 11 EVERY TERM, AND YOUR HONOR MAY OR MAY NOT WANT --

11:36AM 12 THE COURT: SO I WON'T BE THE FINDER OF FACT
11:36AM 13 BECAUSE --

11:36AM 14 MR. FERRALL: NO.

11:36AM 15 THE COURT: WELL, HOW COULD I BE IF THERE'S NO
11:36AM 16 EVIDENTIARY HEARING?

11:36AM 17 MR. FERRALL: YOUR HONOR, WHAT I SAID IS THERE'S NOT
11:36AM 18 GOING TO BE AN EVIDENTIARY HEARING ON EVERY TERM.

11:36AM 19 YOU MAY FIND THAT YOU WANT AN EVIDENTIARY HEARING ON WHAT
11:36AM 20 WE PROPOSE TO BE FILTERED OUT FROM PROTECTABLE EXPRESSION.

11:36AM 21 THE COURT: WE WILL HAVE TO HAVE A FURTHER CASE
11:36AM 22 MANAGEMENT CONFERENCE.

11:36AM 23 LET ME MOVE ON, AND I'M SORRY TO HAVE INTERRUPTED YOUR
11:36AM 24 DISCUSSION.

11:36AM 25 MR. FERRALL: THAT'S ALL RIGHT.

11:36AM 1 BUT LOOK, THE DISCUSSION OBVIOUSLY IS AN IMPORTANT ONE
11:36AM 2 BECAUSE IT'S TRUE THAT THE ISSUE IN OUR MOTION, I'M GOING TO
11:36AM 3 GET TO OUR MOTION ON THIS, OUR MOTION I THINK TAKES CISCO AT
11:37AM 4 THEIR WORD FOR HOW THIS CASE HAS BEEN PROSECUTED AND TRULY
11:37AM 5 ATTEMPTS TO DEAL WITH 198 COMMANDS WHERE THERE IS NO EVIDENCE.

11:37AM 6 WE DON'T HAVE TO DEBATE WHAT THE EXPERTS SAY. WE DON'T
11:37AM 7 HAVE TO DEBATE ABOUT WHAT THE DOCUMENTS SAY. THERE'S NO
11:37AM 8 PRESUMPTION OF ORIGINALITY AS TO THOSE COMMANDS AND THERE'S NO
11:37AM 9 EVIDENCE SUPPORTING THE ORIGINALITY, AND THAT'S JUST A FAILURE
11:37AM 10 OF PROOF, AND THAT'S WHAT SUMMARY JUDGEMENT IS FOR. NOT FRAUD
11:37AM 11 BLANKET STATEMENTS THAT ARE UNDEFINABLE, BUT FAILURE OF PROOF
11:37AM 12 AS TO SPECIFIC COMMANDS THAT HAVE BEEN ASSERTED --

11:37AM 13 THE COURT: AND THOSE 198 COMMANDS WOULD DERIVE FROM
11:37AM 14 THE SIX IDENTIFIED REGISTRATIONS THAT ARE POST THE FIVE-YEAR
11:37AM 15 PERIOD.

11:37AM 16 MR. FERRALL: RIGHT, RIGHT.

11:37AM 17 THE COURT: OKAY.

11:37AM 18 MR. FERRALL: WHY DON'T I TURN TO THAT BECAUSE IT'S
11:37AM 19 OBVIOUSLY A PART OF -- I'VE COMPLETED SOME GENERAL RESPONSES.
11:37AM 20 SO THAT'S A PART OF THE ORIGINALITY DISCUSSION SO LET'S TALK
11:38AM 21 ABOUT THAT.

11:38AM 22 SO IF WE COULD TURN TO SLIDE 31. AND YES, TO RESPOND TO
11:38AM 23 YOUR QUESTION AT THE BEGINNING THIS MORNING, OUR ARGUMENT IS
11:38AM 24 NOT THAT ALL 26 REGISTRATIONS WERE LATE, OUR ARGUMENT IS THAT
11:38AM 25 THERE'S A SET OF REGISTRATIONS THAT WERE VERY LATE AND THE

11:38AM 1 COMMANDS THAT THE SOFTWARE FROM THOSE REGISTRATIONS RECOGNIZE.

11:38AM 2 IN OTHER WORDS, THE COMMANDS THAT WERE FIRST USED WITH
11:38AM 3 THOSE REGISTERED WORKS, THOSE ARE THE ONES THAT DON'T DESERVE A
11:38AM 4 PRESUMPTION.

11:38AM 5 SO THIS IS JUST SECTION 410 FROM THE STATUTE WHICH EXPLAINS
11:38AM 6 HOW THE PRESUMPTION OF VALIDITY IS A BARGAIN. IT IS A WAY OF
11:38AM 7 ENCOURAGING COPYRIGHT HOLDERS TO REGISTER THEIR WORKS PROMPTLY,
11:38AM 8 AND GIVES THEM A PRESUMPTION, A PRIMA FACIE EVIDENCE OF THE
11:38AM 9 VALIDITY OF THE COPYRIGHT.

11:39AM 10 NOW, WE MAY SAVE FOR ANOTHER TIME WHAT THE EXTENT OF THAT
11:39AM 11 IS. BUT AT ITS MOST GENEROUS READING, WHAT IT SAYS IS CISCO
11:39AM 12 MAY BE ABLE TO HAVE A PRESUMPTION OF VALIDITY IN ELEMENTS OF
11:39AM 13 THE WORK IF IT REGISTERS THE WORK WITHIN FIVE YEARS.

11:39AM 14 AND IF YOU GO TO THE NEXT SLIDE, THIS IS AN EXCERPT FROM
11:39AM 15 OUR ANALYSIS OF EVIDENCE THAT CISCO PREPARED. THIS IS ALL SET
11:39AM 16 FORTH IN EXHIBIT 15 OF MR. SANTACANA'S DECLARATION IN WHICH ON
11:39AM 17 A COMMAND-BY-COMMAND BASIS WE NOTE WHEN THE COMMAND WAS FIRST
11:39AM 18 PUBLISHED, THAT IS PART OF A SOFTWARE THAT WAS PUBLISHED, AND
11:39AM 19 WHEN THE REGISTRATION FIRST OCCURRED.

11:39AM 20 AND SO FOR THIS COMMAND SHOW CLOCK WHICH IS ONE OF THE
11:40AM 21 EARLIEST OR AN EARLY ONE, I SHOULDN'T SAY ONE OF THE EARLIEST,
11:40AM 22 BUT THERE WAS NO SOFTWARE REGISTERED FOR THIS UNTIL 2002,
11:40AM 23 VERSION 11.0. AND IN FACT, CISCO DIDN'T REGISTER ANY COPYRIGHT
11:40AM 24 IN ANY OF ITS SOFTWARE UNTIL 2002 WHEN IT SUED HUAWEI WHICH WE
11:40AM 25 TALKED ABOUT.

11:40AM 1 SO EXHIBIT 15 ITEMIZES THE TIMES. AND I DON'T THINK
11:40AM 2 THERE'S ANY DISPUTES ABOUT THOSE FACTS. I THINK THOSE FACTS
11:40AM 3 ARE ALL UNDISPUTED.

11:40AM 4 THE COURT: CISCO ASKED ME TO EXERCISE MY DISCRETION
11:40AM 5 AND GRANT THE PRESUMPTION TO THESE LATE REGISTERED ITEMS.

11:40AM 6 MR. FERRALL: RIGHT. AND HERE'S WHY THE COURT SHOULD
11:40AM 7 NOT DO THAT.

11:40AM 8 THERE IS -- AND LET'S LOOK AT THE CASES THAT CISCO CITED
11:40AM 9 FOR THAT. THAT IS SLIDE 52, I BELIEVE. SO CISCO CITED TWO
11:41AM 10 CASES FOR THE IDEA THAT THE COURT SHOULD EXERCISE ITS
11:41AM 11 DISCRETION AND GRANT THIS PRESUMPTION NONETHELESS.

11:41AM 12 AND IN BOTH CASES, THEY ARE INSTANCES IN WHICH THE
11:41AM 13 DEFENDANT REALLY DIDN'T PROVIDE ANY SUBSTANTIVE QUESTION, ANY
11:41AM 14 REASON FOR THE COURT TO QUESTION THE ORIGINALITY OF THE WORK.

11:41AM 15 ONE, THEY FAILED TO PRESENT ANY EVIDENCE AT ALL. AND
11:41AM 16 ACTUALLY IN BOTH, THE DEFENDANTS FAILED TO PRESENT ANY EVIDENCE
11:41AM 17 CHALLENGING THE ORIGINALITY. AND THAT IS NOT AT ALL THE CASE
11:41AM 18 HERE. SO LET'S TALK ABOUT WHY THERE'S QUESTIONS ABOUT
11:41AM 19 ORIGINALITY IN THIS CASE.

11:41AM 20 ALL OF THE WORKS, ALL OF THE REGISTERED WORKS ARE
11:41AM 21 DERIVATIVE WORKS, AND IF YOU GO TO --

11:42AM 22 THE COURT: WHEN YOU SAY ALL, YOU MEAN THE 198
11:42AM 23 COMMANDS OR EVERYTHING IN THE CASE?

11:42AM 24 MR. FERRALL: SORRY, ALL OF THE 26 REGISTERED WORKS
11:42AM 25 ARE DERIVATIVE WORKS.

11:42AM 1 AND SO IF YOU LOOK AT SLIDE 35, THIS IS AN EXCERPT FROM THE
11:42AM 2 VERY FIRST REGISTRATION AT ISSUE IN THE CASE FOR VERSION 11.0.
11:42AM 3 AND IN A REGISTRATION YOU NEED TO TELL THE COPYRIGHT OFFICE IF
11:42AM 4 IT'S A DERIVATIVE WORK OR NOT.

11:42AM 5 AND WHEN YOU DO, YOU ARE SUPPOSED TO IDENTIFY, WELL, WHAT'S
11:42AM 6 THE PRE-EXISTING WORK ON WHICH THIS DERIVATIVE WORK IS BASED,
11:42AM 7 AND PRESUMABLY THAT'S FOR THE PUBLIC TO KNOW WHAT IS EXCLUSIVE
11:42AM 8 TO THE COPYRIGHT HOLDER, WHAT WAS NEW TO THE COPYRIGHT HOLDER
11:42AM 9 VERSUS WHAT'S IN THE PUBLIC DOMAIN OR NOT NEW.

11:42AM 10 IN FACT, THAT'S WHAT THE STATUTE SAYS ABOUT DERIVATIVE
11:43AM 11 WORKS.

11:43AM 12 WELL, EVERY ONE OF CISCO'S REGISTRATIONS SAYS THIS, WHAT'S
11:43AM 13 THE OLD STUFF, IF YOU WILL. WELL, PRIOR WORKS FOR CLAIMANT,
11:43AM 14 AND PRE-EXISTING THIRD PARTY COMPUTER CODE. THEY NEVER
11:43AM 15 IDENTIFIED WHAT THAT PRE-EXISTING THIRD PARTY COMPUTER CODE IS,
11:43AM 16 BUT WE KNOW, ESSENTIALLY WE ARE STARTING FROM THE ADMISSION
11:43AM 17 THAT THERE'S SOME ASPECT OF CISCO'S WORKS, EVERY ONE OF THEM,
11:43AM 18 THAT IS THIRD PARTY THAT THEY DON'T HAVE RIGHTS OVER.

11:43AM 19 OKAY. AND THAT'S EVERY ASSERTED WORK.

11:43AM 20 SO THERE'S A REASON THEN WHY DERIVATIVE WORKS LIKE CISCO'S
11:43AM 21 HERE CANNOT SERVE AS THE BASIS TO BOOT STRAP THE PRESUMPTION.
11:43AM 22 AND THAT'S THE COOLING SYSTEMS CASE WHICH YOU WILL SEE IF WE
11:43AM 23 SKIP AHEAD TO SLIDES, TO 37.

11:43AM 24 COOLING SYSTEMS WAS A NINTH CIRCUIT CASE IN WHICH A VERY
11:43AM 25 SIMILAR ISSUE AROSE, THE PLAINTIFF SUED ON A DERIVATIVE WORK,

11:44AM 1 AND THE PLAINTIFF TRIED TO INVOKE THE PRESUMPTION OF
11:44AM 2 ORIGINALITY BASED UPON THE DERIVATIVE WORK EVEN THOUGH THE
11:44AM 3 FEATURE THAT WAS SUPPOSEDLY COPIED WAS FROM THE PRE-EXISTING
11:44AM 4 WORK, IT WASN'T NEW TO THE DERIVATIVE WORK.

11:44AM 5 AND THE NINTH CIRCUIT JUST FLAT OUT REJECTED IT. WE
11:44AM 6 REJECTED THE ARGUMENT THAT THE REGISTRATION IN THE DERIVATIVE
11:44AM 7 WORK PERVADES A PRESUMPTION OF VALIDITY OF THE COPYRIGHT UNDER
11:44AM 8 THE --

11:44AM 9 THE COURT: BUT THAT WOULD APPLY TO THE 20
11:44AM 10 CONTRIBUTORY NEGLIGENCE REGISTRATIONS AS WELL, WOULDN'T IT, YOU
11:44AM 11 ARE NOT ARGUING THAT.

11:44AM 12 MR. FERRALL: WE ARE NOT ARGUING THAT AND HERE'S WHY.
11:44AM 13 WE ARE TAKING -- THIS IS SUMMARY JUDGEMENT, YOUR HONOR, WE
11:44AM 14 ARE TRYING TO JUST PRESENT WHAT IS ABSOLUTELY UNDISPUTED.

11:44AM 15 THE COURT: I ONLY WANTED TO CLARIFY IT BECAUSE THE
11:44AM 16 SECTION IN YOUR BRIEF SUGGESTED TO ME THAT YOUR ARGUMENT WOULD
11:44AM 17 APPLY TO ALL 26 BECAUSE THEY ARE DERIVATIVE. BUT FOR THE
11:44AM 18 PURPOSES OF THIS MOTION, YOU ARE ASSERTING IT AGAINST THE SIX
11:44AM 19 AND THAT'S HELPFUL TO CLARIFY.

11:45AM 20 MR. FERRALL: WE ARE.

11:45AM 21 AND IF YOU GO TO THE NEXT SLIDE, IT EXPLAINS HERE HOW WE
11:45AM 22 BREAK DOWN THE COMMANDS. THERE'S 508 TOTAL COMMANDS, OKAY.

11:45AM 23 WE GO TO THE NEXT ONE. THERE WERE DEPOSITIONS OF AUTHORS
11:45AM 24 WITH RESPECT TO 105 OF THOSE COMMANDS. OKAY. WE DID THE MATH,
11:45AM 25 WE SORTED OUT WHO PURPORTEDLY AUTHORED WHAT AND WE DEPOSED A

11:45AM 1 NUMBER OF AUTHORS, SO FINE, WE ARE NOT GOING TO MOVE ON THOSE.

11:45AM 2 FOR ANOTHER 205 COMMANDS, WE DETERMINED, WE ARE GIVING
11:45AM 3 CISCO THE BENEFIT OF THE DOUBT THAT THE REGISTRATION GIVES THEM
11:45AM 4 A PRESUMPTION IF IT'S TIMELY. SO FOR 205 OTHER COMMANDS THE
11:45AM 5 REGISTRATION WAS TIMELY, FINE, WE ARE NOT GOING TO MOVE ON
11:45AM 6 THOSE.

11:45AM 7 THAT LEAVES 198 COMMANDS FOR WHICH THERE WAS NO DEPOSITION
11:45AM 8 OF AN AUTHOR, AND NO EVIDENCE OF ORIGINALITY AND NO
11:45AM 9 PRESUMPTION. SO THAT'S WHAT WE MOVED ON.

11:46AM 10 AND IN RESPONSE TO THAT, IF WE GO TO SLIDE 42, IN RESPONSE
11:46AM 11 TO THAT CISCO COULD HAVE, OF COURSE, PRESENTED EVIDENCE OF
11:46AM 12 ORIGINALITY SUPPORTING THE ORIGINALITY OF THESE COMMANDS.

11:46AM 13 FOR 153 OF THE COMMANDS THEY SUBMITTED NOTHING WHATSOEVER,
11:46AM 14 OKAY. THIS IS THE TYPE OF ISSUE THAT'S APPROPRIATE FOR SUMMARY
11:46AM 15 JUDGEMENT.

11:46AM 16 FOR 45 COMMANDS, THEY SUBMITTED SOME DOCUMENTS BUT THE
11:46AM 17 DOCUMENTS ACROSS THE BOARD, ALL THEY DO IS INDICATE THAT THE
11:46AM 18 COMMAND WAS, IN FACT, DECIDED UPON BY SOMEONE AT CISCO TO USE.
11:46AM 19 THERE WAS NO INDICATION ABOUT WHERE IT CAME FROM, WHY SOMEONE
11:46AM 20 CHOSE THOSE WORDS AS OPPOSED TO ANOTHER, WHETHER THEY BORROWED
11:46AM 21 IT FROM SOMETHING OR NOT.

11:46AM 22 AND THAT, YOUR HONOR, IS IMPORTANT BECAUSE THE LAW SAYS
11:46AM 23 THAT ORIGINALITY IS NOT ABOUT SIMPLY DECIDING TO USE SOMETHING.

11:47AM 24 IF YOU GO TO THE NEXT SLIDE, 43, A COUPLE OF QUOTES ABOUT
11:47AM 25 THE LAW OF ORIGINALITY. THE KEY IS THE PLAINTIFF'S INGENUITY

11:47AM 1 RATHER THAN THE APPROPRIATION OF ANOTHER'S MATERIAL. IT TESTS
11:47AM 2 THE PUTATIVE AUTHOR'S STATE MIND. DID HE HAVE AN EARLIER WORK
11:47AM 3 IN MIND WHEN HE CREATED HIS OWN.

11:47AM 4 WE SAW, FOR EXAMPLE, THE DEPOSITION OF MR. LOUGHEED ABOUT
11:47AM 5 HOW HE CHOSE THE WORD SHOW. WELL, SURE, HE COULD HAVE USED A
11:47AM 6 DIFFERENT WORD. HE COULD HAVE USED ZEBRA IF HE WANTED TO. BUT
11:47AM 7 THE FACT IS THAT HE WAS WORKING AT STANFORD, WORKING ON A
11:47AM 8 NON-CISCO -- ON A SOFTWARE PROGRAM CALLED TOPS 20 WHICH USED
11:47AM 9 SHOW AS A WAY OF CALLING UP PARAMETERS IN THE STATUS OF THE
11:48AM 10 SYSTEM.

11:48AM 11 AND HE DECIDED, MAYBE AMONG OTHER OPTIONS, BUT HE DECIDED
11:48AM 12 TO USE SHOW ALSO. WELL, THAT'S NOT ORIGINAL. JUST BECAUSE HE
11:48AM 13 COULD HAVE USED SOMETHING DIFFERENT THAN WHAT HE WAS ALREADY
11:48AM 14 USING DOESN'T MEAN THAT SELECTION IS ORIGINAL.

11:48AM 15 SO AGAIN, I'M JUST GOING TO CLOSE THIS OUT WITH WHY THIS IS
11:48AM 16 APPROPRIATE FOR SUMMARY JUDGEMENT. YOUR HONOR KNOWS THE DEBATE
11:48AM 17 ABOUT THE NUMBER OF WITNESSES. AND WE DID THE BEST WE COULD
11:48AM 18 WITH WHAT WE HAD AND WE ARE GOING -- I WILL SHOW YOU SOME
11:48AM 19 CONFIDENTIAL TESTIMONY. BUT WE ALSO HAD A 30(B)(6) OF CISCO
11:48AM 20 REGARDING THE CREATION OF THE COMMANDS AND THEIR ORIGINALITY
11:48AM 21 AND HOW THEY COME UP WITH THEM. OKAY.

11:48AM 22 AND THIS IS JUST AN EXAMPLE OF THIS. SLIDE 45.

11:48AM 23 THE COURT: AND THIS IS ALL PUBLIC?

11:49AM 24 MR. FERRALL: SO THIS ONE I'M REMINDED -- NO.

11:49AM 25 THE COURT: SO THERE ARE PEOPLE IN THE COURTROOM THAT

11:49AM 1 WOULD HAVE TO LEAVE, IT'S AN OPEN RECORD RIGHT NOW.

11:49AM 2 MR. FERRALL: AND I'M NOT GOING TO READ IT INTO THE
11:49AM 3 RECORD. WE HAVE REDACTED THE PUBLIC INFORMATION ON THE SCREEN.

11:49AM 4 BUT THE POINT IS THIS IS CISCO'S 30(B)(6) TALKING ABOUT HIS
11:49AM 5 INABILITY TO SPEAK TO THE CREATIVE PROCESS FOR OTHERS.

11:49AM 6 AND AGAIN, THIS WAS IN DISCOVERY, THEY HAD AN OPPOSITION TO
11:49AM 7 A MOTION IN WHICH THEY COULD HAVE PRESENTED EVIDENCE, THEY HAD
11:49AM 8 NONE. THIS IS THE TIME AT THIS STAGE CLOSE TO TRIAL, THIS IS
11:49AM 9 THE TIME TO SAY IF YOU DON'T MEET YOUR BURDEN OF PROOF, THAT'S
11:49AM 10 WHEN THE CASE GETS NARROWED, AND THAT'S THE TIME FOR 198
11:49AM 11 COMMANDS.

11:49AM 12 NOW, I JUST WANT TO SHOW THE COURT A COUPLE OF OTHER
11:49AM 13 EVIDENCE CHALLENGING ORIGINALITY BECAUSE THIS WILL GO TO THE
11:49AM 14 REST OF THE COMMANDS IN THE CASE.

11:50AM 15 IF YOU SKIP TO SLIDE 46, AND AGAIN A LOT OF THIS IS
11:50AM 16 CONFIDENTIAL. BUT THESE ARE EXCERPTS FROM AUTHORS SHOWING
11:50AM 17 COMBINATIONS OF PUBLICLY AVAILABLE COMMAND LIKE SHOW WITH AN
11:50AM 18 INDUSTRY STANDARD TERM.

11:50AM 19 THE COURT: SO LET ME ASK A QUESTION HERE AND I DON'T
11:50AM 20 THINK I WILL STUMBLE INTO ANYTHING THAT'S CONFIDENTIAL BUT
11:50AM 21 INTERRUPT ME PLEASE.

11:50AM 22 SO IF I TAKE ONE WORD FROM THIS COMMAND THAT I GOT FROM,
11:50AM 23 STANFORD YOU SAID, AND IF I TAKE ANOTHER WORD THAT WAS AN
11:50AM 24 INDUSTRY STANDARD BUT CHOOSE TO PUT THEM TOGETHER, WHY ISN'T
11:50AM 25 THAT ORIGINAL?

11:50AM 1 IT'S A COMBINATION, EVEN IF IT'S NOT -- IT MAY NOT BE
11:50AM 2 PROTECTABLE, BUT WE ARE TALKING ABOUT ORIGINALITY HERE.

11:50AM 3 MR. FERRALL: RIGHT.

11:50AM 4 AND I THINK THAT'S WHY THIS IS A QUESTION OF FACT TO BE
11:50AM 5 DECIDED NOT AT A SUMMARY JUDGEMENT STAGE.

11:51AM 6 THE MUNDANENESS, IF YOU WILL, OF USING SOMETHING THAT
11:51AM 7 EVERYONE HAS USED IN THE PAST IN ORDER TO DISPLAY INFORMATION
11:51AM 8 ON A SCREEN LIKE SHOW, AND NOW YOU ARE FACED WITH A TASK OF
11:51AM 9 WELL, I HAVE TO SHOW, WHICH BY THE WAY THE IEEE CAME UP WITH
11:51AM 10 AND WHICH CISCO DOESN'T OWN THE RIGHTS TO, AND I WILL CALL BGP,
11:51AM 11 BGP IS A ROUTING PROTOCOL THAT EVERYONE IN THE INDUSTRY USES,
11:51AM 12 IT STANDS FOR BORDER GATEWAY PROTOCOL.

11:51AM 13 SO IEEE PUBLISHES A DOCUMENT THAT PROVIDES THE PROTOCOL FOR
11:51AM 14 BGP AND ALL THE SPECIFICATIONS AND EVERYONE USES IT. AND NOW
11:51AM 15 CISCO SAYS, WELL, I NEED TO FIGURE OUT HOW I'M GOING TO SHOW
11:51AM 16 THE BGP PARAMETERS AND I USE THE TERM SHOW BGP.

11:52AM 17 NOW THEY COULD PUT ON EVIDENCE AND SAY THAT SUFFICES FOR
11:52AM 18 ORIGINALITY. OUR EXPERT DISAGREES.

11:52AM 19 THE COURT: SO THE PROBLEM IS EVEN WITH A VERY LOW
11:52AM 20 BAR FOR ORIGINALITY, I'M NOT ACTUALLY SURE I AGREE WITH YOU.

11:52AM 21 NOW TWO WORDS IS GOING TO BE HARDER TO PROVE AS ORIGINAL
11:52AM 22 THAN FIVE WORDS STRUNG TOGETHER. EVEN IF WE ARE TAKING
11:52AM 23 APPROXIMATE -- IF EACH ELEMENT, EACH WORD IS UNPROTECTED, WE
11:52AM 24 WILL JUST ASSUME THAT, BUT THE COMBINATION OF THEM CAN BE AN
11:52AM 25 ORIGINAL EXPRESSION, THAT'S CLEAR, ISN'T IT, UNDER THE LAW.

11:52AM 1 MR. FERRALL: NO. I MEAN, THERE'S A NUMBER OF CASES
11:52AM 2 IN WHICH COMBINATIONS OF UNPROTECTABLE ELEMENTS ARE NOT
11:52AM 3 SUFFICIENT TO BE EXPRESSIVE.

11:52AM 4 ONE COMES TO MIND, THE MATTHEW BENDER CASE WHICH IS ABOUT
11:52AM 5 WEST PUBLICATIONS AND VARIOUS ADDITIONS OF FEATURES THAT WERE
11:53AM 6 ADDED TO OPINIONS.

11:53AM 7 AND THE CONSENSUS WAS THAT SURE, THOSE ADDITIONS, THEY
11:53AM 8 COULD HAVE DONE IT DIFFERENT WAYS, THEY DIDN'T HAVE TO DO IT.
11:53AM 9 CISCO'S FOCUS IS ALL ABOUT, IS THERE ONLY ONE WAY TO DO IT.
11:53AM 10 THAT'S NOT THE TEST.

11:53AM 11 THE ISSUE IS, IS THERE CREATIVITY, THAT'S WHY I CITED TO
11:53AM 12 THE SATAVA CASE, BECAUSE IT'S NOT SIMPLY THE CASE THAT ANY
11:53AM 13 COMBINATION OF PUBLIC DOMAIN INFORMATION IS ORIGINAL. YOU'VE
11:53AM 14 GOT TO MAKE -- YOU'VE GOT TO HAVE SOME -- YOU'VE GOT TO PASS A
11:53AM 15 THRESHOLD THAT'S ABOVE ZERO THAT SAYS THERE'S SOME CREATIVITY
11:53AM 16 TO THIS.

11:53AM 17 THE COURT: BUT NOT MUCH ABOVE ZERO.

11:53AM 18 MR. FERRALL: WHAT'S THAT?

11:53AM 19 THE COURT: FOR ORIGINALITY, IT'S NOT MUCH ABOVE
11:53AM 20 ZERO.

11:53AM 21 MR. FERRALL: IT'S NOT MUCH.

11:53AM 22 BUT IF WHAT YOU DO IS BASED UPON WHAT SOMEONE ELSE HAS
11:53AM 23 DONE. AND THAT'S THE CASE WITH THESE SHOW COMMANDS WITH TAKING
11:54AM 24 IP AND ADDING AGAIN, ADDING SOME PROTOCOL NAME THAT SOMEONE
11:54AM 25 ELSE CAME UP WITH TO IP, WHICH IS ANOTHER PROTOCOL NAME.

11:54AM 1 THE COURT: SO I PROBABLY CAN'T SAY -- I MEAN THE
11:54AM 2 PROBLEM WE GET IS THAT WHAT YOU ARE REALLY ESTABLISHING HERE ON
11:54AM 3 YOUR 198, IS IN ORDER TO PROTECT AGAINST CISCO'S MOTION, I HAVE
11:54AM 4 TO DENY YOURS AS WELL.

11:54AM 5 MR. FERRALL: WELL, NO.

11:54AM 6 THE COURT: THEY HAVE PRESENTED NO EVIDENCE
11:54AM 7 WHATSOEVER ON YOUR ORIGINALITY, THAT'S YOUR ARGUMENT.

11:54AM 8 MR. FERRALL: EXACTLY. THAT'S THE DIFFERENCE.

11:54AM 9 THE COURT: OKAY. SORRY, SORRY.

11:54AM 10 MR. FERRALL: WE ARE NOT SEEKING SUMMARY JUDGEMENT ON
11:54AM 11 UN ORIGINALITY ON EVERYTHING, WE ARE SAYING THERE'S A SET WITH
11:54AM 12 NO EVIDENCE.

11:54AM 13 THE COURT: OKAY.

11:54AM 14 MR. FERRALL: AND YOUR HONOR, WE ARE RUNNING THROUGH
11:54AM 15 OR TIME, AND THE IMPORTANT THING IS TO ANSWER YOUR QUESTIONS.
11:54AM 16 BUT SUFFICE IT TO SAY, THERE'S OTHER EVIDENCE HERE, OTHER
11:54AM 17 EXCERPTS, A LOT MORE IN THE RECORD, A LOT MORE FOR TRIAL OF HOW
11:54AM 18 CISCO BORROWED FROM OTHERS TO CREATE THESE COMMANDS.

11:55AM 19 LET ME TURN TO COPYING FOR A MOMENT. AND THEN I WANT TO
11:55AM 20 TALK ABOUT OUR MOTIONS REGARDING THE PROTECTABILITY OF THE
11:55AM 21 HIERARCHY.

11:55AM 22 COPYING, THE COPYING MOTION IS ONE IN WHICH WITH RESPECT TO
11:55AM 23 CISCO'S COUNSEL, THIS WAS NOT A TYPOGRAPHICAL ERROR IN THE
11:55AM 24 ORDER.

11:55AM 25 THE COURT: BUT NOW WE KNOW WHAT THE ISSUE IS.

11:55AM 1 MR. FERRALL: WELL, DO WE THOUGH? BECAUSE -- FIRST
11:55AM 2 OF ALL, WE RECOMMENDED TO A MOTION THAT SOUGHT AN ORDER FOR
11:55AM 3 INFRINGEMENT. SO AT A MINIMUM, THAT'S THE OPPOSITION THAT WE
11:55AM 4 PROVIDED.

11:55AM 5 I'M PREPARED TO TALK ABOUT THE NEW ORDER THEY SOUGHT PER
11:55AM 6 THEIR FOOTNOTE IN THEIR REPLY BRIEF. BUT TO BE CLEAR, THEY
11:55AM 7 SOUGHT THIS ORDER ABOUT INFRINGEMENT IN THEIR NOTICE OF MOTION,
11:55AM 8 AND IF WE CAN'T RELY UPON THAT FOR KNOWING WHAT WE ARE
11:55AM 9 RESPONDING TO, I'M NOT SURE WHAT WE CAN RELY ON.

11:56AM 10 THE COURT: SO YOU WOULD SAY AT THE THRESHOLD LEVEL
11:56AM 11 TO SIMPLY DENY IT FOR LACK OF NOTICE OF THE ACTUAL ISSUE.

11:56AM 12 MR. FERRALL: RIGHT. WE RESPONDED TO ONE MOTION AND
11:56AM 13 THEN IN THE REPLY THEY SAID IT WAS ANOTHER ONE.

11:56AM 14 THE COURT: ALL RIGHT.

11:56AM 15 ON THE COPYING THOUGH -- AND I MAY DO THAT. I DON'T -- YOU
11:56AM 16 KNOW, I WOULD LIKE TO NARROW THIS CASE, BUT YOU KNOW, THAT MAY
11:56AM 17 ULTIMATELY BE THE OUTCOME IS THAT YOU STATE WHAT YOU ARE
11:56AM 18 LOOKING FOR AND THAT SETS THE GROUND RULES, AND I CERTAINLY
11:56AM 19 CAN'T GRANT SUMMARY JUDGEMENT OF INFRINGEMENT BASED ON COPYING.

11:56AM 20 BUT, MAYBE THIS MOVES ALONG TO THERE BEING ULTIMATELY A
11:56AM 21 STIPULATION THAT CAN BE WORKED OUT BECAUSE WHEN I LOOK AT THE
11:56AM 22 EVIDENCE, IT APPEARS TO ME THAT THERE IS, IT'S UNDISPUTED THAT
11:56AM 23 THERE IS VERBATIM COPYING, WHICH ADDRESSES YOUR ISSUE OF
11:56AM 24 WHETHER I DETERMINE THE DEGREE OF PROTECTION WHETHER IT'S GOING
11:56AM 25 TO BE THIN OR BROAD TO DETERMINE IF I NEED TO LOOK AT VERBATIM

11:57AM 1 VERSUS SUBSTANTIALLY SIMILAR.

11:57AM 2 IF CISCO IS ONLY ASKING FOR A FINDING OF VERBATIM, THEN IT
11:57AM 3 DOESN'T ADDRESS THE LESSER STANDARD. AND IT DOES APPEAR THAT
11:57AM 4 THERE IS EVIDENCE UNDISPUTED EVIDENCE OF VERBATIM COPYING.
11:57AM 5 AGAIN, THIS IS JUST AN ELEMENT, IT'S NOT A FINDING OF
11:57AM 6 LIABILITY.

11:57AM 7 IT'S, IN A SENSE, A FRUSTRATING KIND OF MOTION FOR SUMMARY
11:57AM 8 JUDGEMENT, BECAUSE, AM I REALLY GOING TO READ 4,000 PAGES OF
11:57AM 9 DOCUMENTS TO COME UP WITH SOMETHING THAT WON'T TAKE THAT LONG
11:57AM 10 TO PROVE. IT'S A FRUSTRATING EXERCISE FOR ME.

11:57AM 11 BUT I DON'T KNOW -- YOU DIDN'T REALLY DISPUTE THAT YOU HAVE
11:57AM 12 THE COPIED VERBATIM THE CLI ELEMENTS THAT HAVE BEEN ALLEGED.

11:57AM 13 MR. FERRALL: NO. THAT'S ACTUALLY NOT TRUE. WE HAVE
11:57AM 14 YOUR HONOR.

11:57AM 15 SO WITH RESPECT TO -- WELL, TWO THINGS. ARE THERE WORDS
11:57AM 16 THAT APPEAR THE SAME? YEAH, OBVIOUSLY NO ONE CAN DISPUTE --

11:58AM 17 THE COURT: I SAW PAGES OF VERBATIM.

11:58AM 18 MR. FERRALL: BUT THOSE ARE THEIR CONSTRUCTS. I
11:58AM 19 WOULD SUGGEST YOU LOOK AT -- THERE'S THE BLACK REBUTTAL REPORT,
11:58AM 20 WHICH I BELIEVE IS EXHIBIT, IF I HAVE THIS CORRECT, EXHIBIT 38
11:58AM 21 TO THE BLACK DECLARATION.

11:58AM 22 THE COURT: OKAY.

11:58AM 23 MR. FERRALL: AND HE HAS ANALYZED THE SIMILARITY,
11:58AM 24 OKAY, OR ALLEGED SIMILARITY, AND OBVIOUSLY THERE ARE A LOT OF
11:58AM 25 WORDS IN THE COMMANDS THAT ARE THE SAME.

11:58AM 1 BUT HIS REBUTTAL REPORT AT PARAGRAPHS 91 TO 103, AND HIS
11:58AM 2 APPENDIX N, WHICH IS EXHIBIT 65 TO HIS DECLARATION, IS AN
11:58AM 3 EXHAUSTIVE ANALYSIS.

11:58AM 4 IN FACT, I THINK EXHIBIT 65 IS SOMETHING LIKE SIX PARTS.
11:59AM 5 BECAUSE IT'S -- AND I APOLOGIZE FOR THAT YOUR HONOR. BUT YOU
11:59AM 6 GET THE IDEA. HE LOOKED AT EVERY COMMAND AND HOW IT'S USED IN
11:59AM 7 ARISTA.

11:59AM 8 AND WHAT YOU SEE IS THAT FOR ALMOST EVERY COMMAND, ARISTA
11:59AM 9 IMPLEMENTS THESE WORDS IN A DIFFERENT WAY USING DIFFERENT KEY
11:59AM 10 WORDS OR DIFFERENT ARGUMENTS, THAT IS THE OBJECT OF THE
11:59AM 11 COMMAND.

11:59AM 12 AND SO THERE'S A DIFFERENT STRUCTURE TO ALMOST ALL, NOT
11:59AM 13 ALL, BUT ALMOST ALL OF THE COMMANDS, AND THAT'S ITEMIZED IN
11:59AM 14 EXHIBIT 65. SO YES, WE ABSOLUTELY DISPUTE VERBATIM COPYING
11:59AM 15 EVEN AS TO THE 508.

11:59AM 16 BUT REMEMBER, THE MOTION THAT THEY BROUGHT WAS FOR
11:59AM 17 INFRINGEMENT, FINE, WE ARE BEYOND THAT. THE MOTION THEY NOW
11:59AM 18 SAY THEY BROUGHT WAS FOR COPYING OF THE CISCO CLI. AND THERE'S
11:59AM 19 NO EVIDENCE WHATSOEVER OF VERBATIM COPYING OF THE CISCO CLI.
12:00PM 20 THERE'S AT LEAST 10,000 OR MORE COMMANDS THAT AREN'T EVEN
12:00PM 21 ALLEGED TO BE COPIED, MUCH LESS VERBATIM.

12:00PM 22 THE COURT: WELL, THAT WAS A BIG CONCERN THAT I HAD.
12:00PM 23 I QUESTIONED MS. SULLIVAN ABOUT THAT IS THAT IT SEEMS TO ME
12:00PM 24 THAT ACTUALLY A DETERMINATION OF A MATTER OF LAW VERBATIM
12:00PM 25 COPYING WOULD HAVE TO BE ITEM BY ITEM, OTHERWISE I THINK IT'S A

12:00PM 1 DUE PROCESS VIOLATION FOR YOU, YOU DON'T KNOW WHAT I HAVE
12:00PM 2 ACTUALLY FOUND. IT'S LIKE AN EMPTY BOX THAT WOULD BE FILLED
12:00PM 3 LATER.

12:00PM 4 MR. FERRALL: RIGHT.

12:00PM 5 THE COURT: SO I'M VERY CONCERNED ABOUT THAT, AND I
12:00PM 6 WOULD NEED SIX MONTHS TO DO THIS ORDER IF I HAVE TO DO THAT. I
12:00PM 7 DON'T HAVE SIX MONTHS.

12:00PM 8 MR. FERRALL: OF COURSE.

12:00PM 9 THE COURT: SO I'M JUST TROUBLED BY A GENERIC
12:00PM 10 STATEMENT OF VERBATIM COPYING WHEN I DON'T KNOW WHAT THE
12:00PM 11 CONTENT OF THE COPYING IS.

12:00PM 12 AND SO, YOU KNOW, MAYBE THAT MEANS I CAN'T MAKE ANY HEADWAY
12:01PM 13 ON THIS MOTION OTHER THAN TO DENY IT. THE JURY WILL DETERMINE
12:01PM 14 COPYING.

12:01PM 15 MR. FERRALL: RIGHT.

12:01PM 16 AND YOUR HONOR, IF YOU DENIED IT, YOU WOULD BE AMONG EVERY
12:01PM 17 OTHER COURT THAT HAS -- TO THE EXTENT ANY HAS ADDRESSED THIS
12:01PM 18 ISSUE, THERE IS NOT A SINGLE CASE THAT CISCO HAS CITED IN WHICH
12:01PM 19 THE ABSTRACT NOTION OF COPYING, WITHOUT DEFINING PRECISELY WHAT
12:01PM 20 WAS COPIED AND WHAT IS PROTECTABLE THAT WAS COPIED HAS EVER
12:01PM 21 BEEN GRANTED. THERE'S NOT A SINGLE CASE THEY CITE FOR THAT.
12:01PM 22 SO YOU WOULD BE BLAZING A NEW TRAIL, IF YOU WILL.

12:01PM 23 THE COURT: I'M NOT LOOKING TO DO THAT.

12:01PM 24 MR. FERRALL: AND THERE'S GOOD REASON, YOUR HONOR.

12:01PM 25 IF YOU LOOK AT SLIDE 68, I BELIEVE, SO THIS IS ANOTHER

1 QUOTE FROM HARPER HOUSE, AND WE CITE SOME OTHER CASES. IN A
2 CASE SUCH AS THIS, GIVEN THE NEGATIVE CONNOTATIONS TO COPYING,
3 THERE WAS AN OBVIOUS RISK OF AN IMPROPER VERDICT FOR THE
4 PLAINTIFFS AND A NEED FOR FURTHER INSTRUCTIONS TO PROTECT
5 LEGITIMATE ACTIVITY AND AVOID THE SUFFOCATION OF COMPETITION.

6 THAT'S WHAT I'M SAYING, YOUR HONOR. ALL THE CASES THAT
7 TALK ABOUT COPYING, WHETHER IT'S ON SUMMARY JUDGEMENT OR
8 POST-TRIAL MOTION, IT'S COPYING OF PROTECTABLE EXPRESSION.
9 IT'S NOT AN ABSTRACT DECLARATION OF COPYING.

10 AND THE NEXT SLIDE GETS TO THE PUBLIC POLICY PART OF IT.

11 THE COURT: AND SO THAT HELPS ME TO ORDER THE ISSUES
12 YOU WANT -- YOU RECOMMEND I DETERMINE WHAT'S PROTECTABLE BEFORE
13 I EVEN ENGAGE IN A DETERMINATION OF WHAT'S COPYING.

14 MR. FERRALL: RIGHT, RIGHT.

15 AND WE SUBMIT THAT COPYING IS, THAT'S ULTIMATELY THE
16 QUESTION FOR THE JURY, IS TO DETERMINE COPYING BECAUSE THERE'S
17 A PROCESS TO GO ABOUT THIS.

18 YOU DO THE DISSECTION, YOU DETERMINE WHAT'S PROTECTABLE,
19 YOU DETERMINE THEN THE SCOPE OF WHAT'S PROTECTABLE, AS WELL IT
20 BE ADJUDGED ON A VIRTUAL IDENTITY STANDARD OR SHOULD IT BE
21 JUDGED ON A SUBSTANTIAL SIMILARITY STANDARD, AND THEN YOU
22 COMPARE THE WORKS BASED UPON THE APPROPRIATE STANDARD AND
23 THAT'S WHAT THE JURY DECIDES. WAS THE COPYING, TO THE EXTENT
24 THERE WAS COPYING OF PROTECTABLE EXPRESSION, DOES THAT RISE TO
25 THE LEVEL OF INFRINGEMENT.

12:03PM 1 AND FUNDAMENTALLY, YOUR HONOR, THIS IS THE, THE MATTEL CASE
12:03PM 2 AND COUNTLESS OTHERS, THIS IS WHAT IS AT THE HEART OF THIS
12:03PM 3 CASE.

12:03PM 4 THE COURT: YEAH.

12:03PM 5 MR. FERRALL: SOUND BYTES ABOUT COPYING DON'T MEAN
12:03PM 6 ANYTHING IF WHAT YOU COPIED IS LEGAL TO COPY, IS IN THE PUBLIC
12:03PM 7 DOMAIN.

12:03PM 8 AND THAT'S WHAT THEY HAVE, THEY'VE GOT LOTS OF SOUND BYTES
12:03PM 9 ABOUT COPYING, BUT SURE, WHAT WAS COPIED AND WAS IT PROTECTABLE
12:03PM 10 AND IS IT REALLY CISCO'S RIGHT TO CLAIM EXCUSE ACTIVITY OVER
12:03PM 11 EVERY ONE OF THESE THINGS OR ANY OF THEM.

12:03PM 12 THE COURT: OKAY.

12:04PM 13 MR. FERRALL: SO IF I COULD MINUTE -- A COUPLE OF
12:04PM 14 MINUTES ON OUR MOTION REGARDING COPYRIGHTABILITY AS TO TWO
12:04PM 15 DISCREET ELEMENTS THAT THEY HAVE ASSERTED. THE HIERARCHIES AND
12:04PM 16 THE MODES.

12:04PM 17 WE TALKED -- COUNSEL FOR CISCO TALKED A LITTLE BIT THE
12:04PM 18 HIERARCHIES AND THE MODES BUT I'M GOING TO EXPLORE THEM IN A
12:04PM 19 LITTLE MORE DEPTH BECAUSE FUNDAMENTALLY, THIS CLAIM, OBVIOUSLY
12:04PM 20 I THINK WE'RE ALL IN AGREEMENT THEY CAN'T POSSIBLY CLAIM
12:04PM 21 COPYRIGHT PROTECTION IN THE IDEA OF A HIERARCHY. BUT THEY
12:04PM 22 ALSO, WHAT THIS HIERARCHY CLAIM IS, IS A METHOD OF OPERATION OF
12:05PM 23 GROUPING COMMANDS BY COMMON ROOT WORD.

12:05PM 24 AND YOUR HONOR LATCHED UPON THE BIKRAM'S YOGA CASE WHICH IS
12:05PM 25 EXACTLY THE ONE THAT I WOULD TALK ABOUT ALSO ABOUT THIS. IF

1 CISCO WERE TO PREVAIL AND CLAIM, AND HAVE COPYRIGHT PROTECTION
2 OVER A HIERARCHY OF COMMANDS, PRESUMABLY EVERY OTHER COMPETITOR
3 WOULD BE PREVENTED FROM USING A WORD LIKE SHOW AS ITS INITIAL
4 COMMAND IN ITS COMMAND STRUCTURE.

5 IT'S REALLY, WHAT IT COMES DOWN TO IS AN EFFORT TO
6 ESSENTIALLY CLAIM COPYRIGHT PROTECTION OVER THAT INITIAL WORD
7 LIKE SHOW OR IP, EVEN THOUGH THEY HAVE SAID BOTH PUBLICLY THEIR
8 LAWYERS SAID IT AND THEY HAVE SAID IT IN THE PAPERS, THEY HAVE
9 DISCLAIMED, THEY HAVE DISAVOWED COPYRIGHT IN SINGLE WORDS LIKE
10 SHOW AND IP AND SO FORTH.

11 THEY KNOW THEY CAN'T PROTECT THAT. BUT BY SAYING WELL,
12 WE'VE GOT A HIERARCHY THAT BEGINS WITH SHOW AND THEN THEY HAVE
13 EFFECTIVELY ARE TRYING TO PREVENT THE REST OF THE INDUSTRY FROM
14 STRUCTURING COMMANDS AROUND A COMMON FIRST WORD.

15 AND THAT'S NOT WHAT IS ALLOWED. BIKRAM'S YOGA, YOUR HONOR
16 KNOWS THE ISSUE WAS THERE WAS A COPYRIGHT IN THE BOOK, A
17 LITERARY WORK JUST LIKE COMPUTER CODE IS A LITERARY WORK, IT'S
18 THE SAME TYPE OF COPYRIGHT.

19 AND THIS WAS NOT ABOUT TRYING TO GET PROTECTION IN THE
20 LITERAL ELEMENTS OF THE BOOK, BUT AN ABSTRACTION, NAMELY THIS
21 SEQUENCE OF POSES THAT IS DESCRIBED.

22 LIKEWISE HERE, THIS IS NOT ABOUT THE LITERAL PROTECTION OF
23 THE SOURCE CODE, IT'S ABOUT AN ABSTRACTION. WHAT IS THE NATURE
24 OF THE GROUPING OF COMMANDS THAT MIGHT BE USED BY THE SOURCE
25 CODE.

1 AND WHAT'S IMPORTANT IN THE BIKRAM'S YOGA CASE, I WANT TO
2 EMPHASIZE. THEY HELD THE SEQUENCE WAS UN PROTECTABLE AS A
3 METHOD OR A PROCESS, EVEN THOUGH THIS WAS BEAUTIFUL. EVEN
4 THOUGH IT WAS CREATIVE, EVEN THOUGH THEY COULD HAVE PUT IT --
5 MR. BIKRAM COULD HAVE PUT IT IN COUNTLESS DIFFERENT ORDER AND
6 STILL HAD SOMETHING CREATIVE, RIGHT. THERE WAS ALL SORTS OF
7 ALTERNATIVES AVAILABLE TO HIM. THERE WAS CREATIVITY TO IT.
8 BUT IT WAS NEVERTHELESS, A PROCESS THAT COPYRIGHT WILL NOT
9 PROTECT.

10 SO IF WE CAN LOOK AT SLIDE FIVE WHAT I WOULD LIKE TO DO NOW
11 IS DIG DEEP INTO WHAT THE HIERARCHIES ARE BECAUSE I THINK AFTER
12 JUST LOOKING AT A FEW PIECES OF EVIDENCE HERE, IT WILL BE CLEAR
13 THERE'S NOT A COPYRIGHTED WORK THAT'S CALLED THE HIERARCHIES.
14 NOT ONLY THAT, YOU ARE NOT GOING TO FIND SOMETHING IN THE
15 COPYRIGHTED WORK THAT IS THE HIERARCHY.

16 EVERYTHING THAT YOU SEE, BOTH IN THE PAPERS AND IN THE
17 SLIDE DECK ABOUT THE HIERARCHIES, IS SOMETHING CISCO'S LAWYERS
18 OR EXPERT CREATED FOR THIS CASE. AND THEY CREATED IT BY
19 APPLYING THEIR CONCEPT OF HOW COMMANDS ARE ORGANIZED, THAT IS
20 EVEN A HIGHER LEVEL ABSTRACTION FROM THE REGISTERED WORK THAN
21 THE COMMANDS THEMSELVES.

22 THIS IS AS ABSTRACT AS YOU CAN GET. IT'S POST-HOC LAWYER
23 CREATED DEFINITION OF HOW TO ORGANIZE THE COMMANDS.

24 AND SO WHAT IT ENDS UP BEING, YOUR HONOR, IS THAT THE
25 HIERARCHIES ARE ESSENTIALLY DOUBLE DIPPING INTO THE WORDS OF

1 THE COMMANDS THEMSELVES.

2 THIS IS A POINT THEY ARE ESSENTIALLY CLAIMING NOW ANOTHER
3 WAY OF GETTING EXCLUSIVITY OVER THE WORDS OF THE COMMANDS,
4 EXCEPT THIS TIME INSTEAD OF THE COMBINATION OF THOSE WORDS
5 WHICH WE JUST DEBATED ABOUT, IT'S JUST THE FIRST WORD FOLLOWED
6 BY WHATEVER IT FOLLOWS.

7 SO THIS IS THE WAY THEY DEFINE THE HIERARCHY WITHIN A GIVEN
8 DEMAND HIERARCHY ALL THE COMMANDS START WITH THE SAME WORD.
9 SAME WITH THE SUB-HIERARCHY. OKAY.

10 AND THEN THE -- IN THEIR MOTION THEMSELVES IF WE GO TO THE
11 NEXT SLIDE, THEIR MOTION, THEIR OPPOSITION TO OUR MOTION,
12 EXPLAINS BECAUSE CISCO'S COMMAND EXPRESSIONS ARE ORGANIZED
13 HIERARCHICALLY, THE COPING OF CISCO'S COMMAND EXPRESSIONS
14 DESCRIBED IN EXHIBIT B, ITSELF REFLECTS ARISTA'S COPYING OF
15 CISCO'S COMMAND HIERARCHIES.

16 THAT'S OUR POINT. THEIR HIERARCHIES ARE INSEPARABLE FROM
17 THE WORDS THEMSELVES AND IT'S SIMPLY A MEANS OF TRYING TO GET A
18 BROADER PROTECTION FOR THESE WORDS BASED UPON HOW THEY'RE
19 ORGANIZED. BUT HOW THEY ARE ORGANIZED IS A PRESS. IT'S NOT
20 EXPRESSION.

21 SO LET ME SHOW YOU AN EXAMPLE OF A HIERARCHY, AND THIS IS
22 AN EXAMPLE THAT CISCO USES, AND SHOW YOU HOW THESE HIERARCHIES
23 ARE NOT EXPRESSION IN THE WORK BUT RATHER THEY ARE A CREATION
24 THAT'S APPLIED AFTER THE FACT.

25 SLIDE 7, WE'VE SELECTED SEVEN COMMANDS THAT ALL BEGIN WITH

1 IP. THESE ARE SEVEN ASSERTED COMMANDS. THE NEXT SLIDE WE
2 COMBINED THAT WITH EXHIBIT 48 FROM CISCO'S OPPOSITION WHICH IS
3 AN EXEMPLARY HIERARCHY, THIS IS WHAT THEY CALL AN EXAMPLE OF
4 THEIR IP HIERARCHY.

5 THE TREE THAT YOU SEE AT THE TOP THERE, YOU WILL NOT FIND
6 THAT IN ANY REGISTERED WORK. YOU WILL NOT FIND THAT IN ANY
7 DOCUMENT, THAT'S A CREATION OF THIS CASE. AND IT WAS CREATED,
8 AS YOU WILL SEE IN THE SUBSEQUENT SLIDES, WE CAN JUST MARCH
9 THROUGH THEM QUICKLY, IT'S CREATED BY SIMPLY MAPPING THE
10 COMMANDS THAT EXISTED ON TO THE A TREE THAT THE EXPERTS
11 CREATED.

12 SO WHAT IS CLAIMED AS A HIERARCHY IS THIS PROCESS. IT'S A
13 PROCESS, NOT EXPRESSION. AND I WOULD URGE THE COURT TO
14 CONSIDER NOW MR. LOUGHEED'S DESCRIPTION OF THE HIERARCHY: SO
15 IT STARTS ON PAGE 14, AND I BELIEVE THIS IS STILL CONFIDENTIAL.

16 THE COURT: OKAY.

17 MR. FERRALL: MR. LOUGHEED WAS IDENTIFIED AS THE
18 AUTHOR OF THE HIERARCHIES. AND HE FIRST DESCRIBES IN THIS CASE
19 WE ARE ASKING HIM ABOUT A DIFFERENT PART OF THE IP HIERARCHY,
20 BUT HE TALKS ABOUT HOW HE CAME UP WITH THE USE OF THAT TERM.
21 AND THEN ON THE NEXT PAGE IS A MORE, AS A BROADER EXPLANATION
22 OF WHAT A HIERARCHY MEANS. AND IT'S THE LAST SENTENCE ON THAT
23 SLIDE 15 THAT'S HIGHLIGHTED THAT I THINK CAPTURES IT. THIS IS
24 EXACTLY OUR POINT ABOUT WHAT THE HIERARCHY IS. IT'S A PROCESS.

25 SO THERE'S TWO OTHER POINTS I WANT TO MAKE ABOUT THE

12:14PM 1 HIERARCHY WHICH IT GOES TO HOW IT IS A CREATION OF THE CASE
12:14PM 2 THAT THE FULL HIERARCHY THAT THEY ARE CLAIMING IS A CREATION OF
12:14PM 3 THE LAWYERS IN THE CASE.

12:14PM 4 IF YOU LOOK AT SLIDE 17, THIS IS NOT CONFIDENTIAL ANYMORE.
12:14PM 5 SO THIS IS THE SAME IP HIERARCHY THAT WE SAW EARLIER.

12:14PM 6 AGAIN, THE TREE DOESN'T EXIST ANYWHERE BUT FOR THIS
12:14PM 7 LITIGATION, SO WE WENT BACK AND WE LOOKED AT, OKAY, WELL, THEY
12:14PM 8 ARE CLAIMING THIS TREE NOW, WAS THIS TREE ACTUALLY CREATED BY
12:14PM 9 SOMEONE?

12:14PM 10 AND THE ANSWER IS NO. IT SPANS COMMANDS THAT WERE
12:14PM 11 DEVELOPED AND RELEASED OVER THE COURSE OF 22 YEARS. SO
12:15PM 12 THERE'S -- IT'S A, AGAIN, I THINK IT JUST DRIVES HOME THE FACT
12:15PM 13 THAT THIS IS A CREATION FOR THE CASE AND IT IS A CREATION THAT
12:15PM 14 IS A PROCESS, IT'S THE HIGHEST LEVEL ABSTRACTION.

12:15PM 15 THE LAST THING I WANT TO TALK ABOUT IS THE FACT THAT IT'S
12:15PM 16 NOT EVEN A HIERARCHY THAT IS REFLECTED IN THE WORK AS A WHOLE,
12:15PM 17 IT IS A SELECTION OF COMMANDS THAT THEY HAVE ASSERTED THAT THEY
12:15PM 18 THEN GROUPED INTO A TREE.

12:15PM 19 SO IF YOU LOOK, FOR EXAMPLE, AT SLIDE 18, THIS IS, SLIDE 18
12:15PM 20 IS AN EXCERPT FROM CISCO'S EXPERT REPORT, DR. ALMEROOTH TALKING
12:15PM 21 ABOUT HIERARCHIES, AND WHAT HE DOES IS HE COMBINES AN EXCERPT
12:15PM 22 OF BORDER GATEWAY PROTOCOL, THAT'S BGP THAT I TALKED ABOUT
12:16PM 23 EARLIER.

12:16PM 24 THERE'S A LIST OF BGP COMMANDS, AND THEN ON TOP OF IT IS A
12:16PM 25 TREE STRUCTURE. AND YOU WILL SEE WHAT I THEY ARE CLAIMING AS A

12:16PM 1 HIERARCHY, THEY DON'T EVEN CLAIM ALL OF THE COMMANDS THAT FALL
12:16PM 2 WITHIN THE BGP FAMILY. INSTEAD, THEY HIGHLIGHT THE ONES THAT
12:16PM 3 THEY WANT TO ASSERT IN THE CASE BECAUSE SO DOUBT BECAUSE THEY
12:16PM 4 ARE SIMILAR TO ARISTA, AND THEY ELIMINATE THE REST.

12:16PM 5 SO IF WE ARE GOING TO TALK ABOUT A HEIRARCHY AS BEING A
12:16PM 6 CREATION OF CISCO AS OPPOSED TO A CREATION OF CISCO'S LAWYERS,
12:16PM 7 LET'S AT LEAST LOOK AT WHAT EXISTS IN THAT FAMILY OF COMMANDS.

12:16PM 8 YOU WILL SEE THREE OF THE COMMANDS ARE BLACKED OUT, I'M NOT
12:16PM 9 EVEN SURE THAT'S UNDER THERE, TWO OF THE COMMANDS, ADDRESS
12:16PM 10 FAMILY AND AGGREGATE ADDRESS ARE HIGHLIGHTED PRESUMABLY BECAUSE
12:17PM 11 ARISTA DOESN'T USE THOSE, SO WE ARE NOT GOING TO TALK ABOUT
12:17PM 12 THAT AS A HIERARCHY.

12:17PM 13 SO AGAIN, THIS IS THE SORT OF ISSUE THAT'S RIPE FOR SUMMARY
12:17PM 14 JUDGEMENT. WE ARE NOT PRESENTING COMPETING TESTIMONY ABOUT IT.
12:17PM 15 THIS IS A PURE ISSUE ABOUT WHETHER THIS HIGHEST OF ABSTRACTIONS
12:17PM 16 CAN POSSIBLY BE PROTECTED OR WHETHER IT'S A PROCESS OR A METHOD
12:17PM 17 OF OPERATION LIKE THE BEAK RAM PROCESS.

12:17PM 18 THE SAME ARGUMENT APPLIES TO THE MODES. I THINK WE GOT
12:17PM 19 SOME CLARIFICATION THAT THE MODES THAT THEY ARE ASSERTING ARE
12:17PM 20 NOT THE IDEA OF HAVING DIFFERENT MODES, CLEARLY THEY CANNOT
12:17PM 21 HAVE THAT. THEY CANNOT HAVE EXCLUSIVITY OVER THE IDEA OF
12:17PM 22 DIFFERENT MODES OF OPERATION.

12:17PM 23 AND SO THE QUESTION IS ALL THAT'S LEFT, REALLY, IS THE NAME
12:18PM 24 OF THE MODES AND WHAT THEY CALL THE PROMPT.

12:18PM 25 SO IF WE LOOKED AT SLIDE 22, THESE ARE THE NAMES. USER

12:18PM 1 EXEC, PRIVILEGED EXEC, GLOBAL CONFIGURATION AND INTERFACE
12:18PM 2 CONFIGURATION. THEY ASSERT THEM A COUPLE OF DIFFERENT WAYS,
12:18PM 3 THAT'S WHY THEY SAY THERE'S EIGHT, BUT IT'S REALLY THESE WORDS
12:18PM 4 THAT ARE SUPPOSEDLY PROTECTABLE.

12:18PM 5 AND YOUR HONOR, THIS AGAIN, IS SOMETHING THAT CAN BE
12:18PM 6 RESOLVED AS A MATTER OF LAW WHICH IS SIMPLY APPLYING THE
12:18PM 7 COPYRIGHT REGULATIONS AND THE CASE LAW THAT SAYS WORDS THIS
12:18PM 8 SHORT, PHRASES THIS SHORT ARE NOT SUBJECT TO COPYRIGHT.

12:18PM 9 SO IF WE LOOK AT THE SLIDE FROM THE, I THINK IT'S THE NEXT
12:18PM 10 SLIDE, YEAH, THIS IS THE CODE OF FEDERAL REGULATIONS UNDER THE
12:19PM 11 COPYRIGHT ACT, WORDS NOT SUBJECT TO COPYRIGHT, WORDS SHORT
12:19PM 12 PHRASES SUCH AS NAMES, TITLES, SLOGANS, FAMILIAR SYMBOLS,
12:19PM 13 THAT'S LIKE THE SYMBOLS THAT ARE INVOLVED HERE AND DESIGNS.

12:19PM 14 SO EXEC, PRIVILEGED EXEC, THESE ARE -- THESE ARE EXACTLY
12:19PM 15 THE SORT OF 1, 2-WORD PHRASES THAT COPYRIGHT DOESN'T PROTECT.

12:19PM 16 THE NARELL V. FREEMAN CASE WHICH I COULDN'T HELP BUT CITE
12:19PM 17 YOUR HONOR FOR YOUR SAKE --

12:19PM 18 THE COURT: THAT'S WHAT HAPPENS WHEN YOU HAVE A
12:19PM 19 COMMON NAME.

12:19PM 20 MR. FERRALL: RIGHT.

12:19PM 21 BUT REALLY, IT'S AN INTERESTING CASE ACTUALLY, IT'S ABOUT
12:19PM 22 THESE HISTORICAL BOOKS ABOUT SAN FRANCISCO IN WHICH THERE WAS
12:19PM 23 ALLEGED COPYING BECAUSE THE SECOND AUTHOR USED SOME OF THE SAME
12:19PM 24 PHRASES.

12:19PM 25 THE PHRASES THERE ARE 4, 5, 6 WORDS LONG. AND THE COURT

12:19PM 1 SAYS, NO, NO, NOT GOOD ENOUGH. A PHRASE LIKE THE BEACH WAS
12:20PM 2 STREWN WITH BAILS AND PILES. OKAY, FINE. SO IT'S THE SAME AND
12:20PM 3 MAYBE SHE EVEN TOOK IT FROM THE PRIOR AUTHOR, BUT IT'S NOT
12:20PM 4 ENOUGH.

12:20PM 5 THE COURT: THAT REMINDS ME OF THE ARGUMENT YOU MAKE
12:20PM 6 EARLIER IN THE -- WHAT IS THE UNIVERSE THAT WE ARE COMPARING
12:20PM 7 THESE ITEMS TO, IS IT THE UNIVERSE OF WHAT'S DEFINED AS CISCO'S
12:20PM 8 CLI, IS IT THE UNIVERSE OF ALL 26 REGISTRATIONS THAT ARE
12:20PM 9 INVOKED FOR THIS CASE?

12:20PM 10 MR. FERRALL: WELL, IT'S -- FIRST OF ALL, IT'S
12:20PM 11 ULTIMATELY THE REGISTERED WORK IS WHAT HAS TO BE COMPARED.

12:20PM 12 BUT WHAT WE ARE DOING HERE BY THESE SUMMARY JUDGEMENT
12:20PM 13 ARGUMENTS, YOUR HONOR, IS WE ARE TRYING TO GET AHEAD OF THE
12:20PM 14 ANALYTIC DISSECTION. ON ISSUES THAT WE SAY ARE SUBJECT TO NO
12:20PM 15 DISPUTE AND PURELY ISSUES OF LAW.

12:20PM 16 SO YEAH, WE COULD DEAL WITH THIS ON ANALYTIC DISSECTION, WE
12:20PM 17 COULD DEAL WITH HIERARCHIES ON IT TOO. BUT WE SAY FOR MODES
12:21PM 18 FOR HIERARCHIES AND FOR 198 COMMANDS, THERE'S NO DISPUTE AND
12:21PM 19 YOU COULD RESOLVE IT NOW UNDER THE SUMMARY JUDGEMENT STANDARD
12:21PM 20 INSTEAD OF CONSIDERING IT LATER FOR FILTRATION AND LET'S FACE
12:21PM 21 IT, WE'VE GOT ENOUGH TO DID LATER, SO IF THERE'S NO DISPUTE,
12:21PM 22 LET'S GET IT DONE NOW.

12:21PM 23 THE COURT: OKAY.

12:21PM 24 MR. FERRALL: THANK YOU.

12:21PM 25 THE COURT: ALL RIGHT.

12:21PM 1 WELL, LET'S SEE HOW WE CAN BEST USE THIS TIME, TEN MINUTES
12:21PM 2 ISN'T VERY LONG TO COME BACK ON THIS, MS. SULLIVAN, WHAT'S YOUR
12:21PM 3 PLEASURE?

12:21PM 4 MS. SULLIVAN: YOUR HONOR, WHAT WE RESPECTFULLY
12:21PM 5 SUGGEST, IS I RESPOND NOW ON THE TWO COPYRIGHT ISSUES AND THE
12:21PM 6 REMAINING TIME TO TRY TO ASSIST YOUR HONOR TO COME TO A
12:21PM 7 RESOLUTION ON THOSE, AND MR. PAK WILL BE HANDLING THE PATENT
12:21PM 8 ISSUE, IS QUITE WILLING TO RETURN AT YOUR HONOR'S CONVENIENCE
12:21PM 9 TO ARGUE THAT ON MONDAY, AND WE DO THINK A FULL HEARING ON THE
12:21PM 10 PATENT WOULD BE APPROPRIATE IF ARISTA HAS NO DISAGREEMENT ON
12:21PM 11 THAT. IT'S THEIR MOTION.

12:21PM 12 MR. VAN NEST: THAT'S FINE, YOUR HONOR. AND I CAN
12:21PM 13 REST ON THE PAPERS AS TO FAIR USE.

12:21PM 14 THE COURT: I THINK YOU CAN.

12:21PM 15 MR. VAN NEST: THANK YOU.

12:21PM 16 MS. SULLIVAN: SO TEN MINUTES OF COPYRIGHT REBUTTAL?

12:22PM 17 THE COURT: I THINK THAT MAKES SENSE. AND I WOULD
12:22PM 18 LIKE IT ON MONDAY. WE WILL TALK ABOUT A TIME IN A MINUTE.

12:22PM 19 MS. SULLIVAN: SO YOUR HONOR, I WANT TO TRY TO HELP
12:22PM 20 SIMPLIFY THE CASE.

12:22PM 21 YOU'VE HEARD FROM MY ABLE FRIEND A GREAT DEAL OF DETAIL
12:22PM 22 THAT WITH RESPECT SHOULD NOT BE AIRED AGAIN BEFORE THE JURY.

12:22PM 23 THERE ARE TWO VERY SIMPLE ISSUES THE COURT CAN RESOLVE NOW
12:22PM 24 BY JUDGMENT IN CISCO'S FAVOR. I THINK IT'S ABSOLUTELY EVIDENT
12:22PM 25 YOU CAN'T RESOLVE COPYRIGHTABILITY IN ARISTA'S FAVOR. I THINK

1 MR. FARRELL ALREADY MADE A NUMBER OF CONCESSIONS THAT CERTAIN
2 CONTESTED FACTS EXISTED, BUT LET ME FOCUS ON WHY YOU CERTAINLY
3 CAN'T AWARD IT IN THEIR FAVOR AND WHY YOU SHOULD AWARD IT IN
4 OURS.

5 ORIGINALITY IS A LOW BAR. EVEN WITHOUT PRESUMPTION, WE
6 HAVE PUT IN UNDISPUTED EVIDENCE OF A CREATIVE, SUBJECTIVE
7 PROCESS. WE HAVE SHOWN YOU ARISTA'S OWN ADMISSIONS OF
8 SUBJECTIVITY FROM MR. SWEENEY BACK WHEN HE WAS ASKED -- VERY
9 SUBJECTIVE PROCESS. WE'VE SHOWN YOU CVI, WE'VE SHOWN YOU IT'S
10 SUBJECTIVE.

11 UNDER THE CDN COIN PRICING CASE WHEN THERE'S A CREATIVE,
12 SUBJECTIVE JUDGMENT, EXERCISE OF JUDGMENT AMONG MANY CHOICES IN
13 HOW TO EXPRESS SOMETHING, THAT'S ENOUGH TO GET OVER THE LOW BAR
14 ON ORIGINALITY.

15 SO WE SHOULD HAVE THIS DECISION IN OUR FAVOR BASED ON THE
16 EVIDENCE THAT'S IN THE RECORD.

17 THEY SAY OH, THERE'S 198, YOU DIDN'T GIVE EVIDENCE ABOUT
18 THAT. WELL, WITH RESPECT FIRST, YOU SHOULD EXERCISE THE
19 PRESUMPTION IN YOUR DISCRETION, CJ PRODUCTS IS CLEAR, I
20 RESPECTFULLY SUBMIT, YOUR HONOR, THAT THE COOLING SYSTEMS CASE
21 IS MISREPRESENTED IN THE BRIEFING.

22 IF YOU LOOK AT IT YOU WILL SEE THE ISSUE THERE WAS THERE A
23 LATER REGISTRATION TRIED TO INCORPORATE WORK THAT DIDN'T HAVE
24 COPYRIGHT PROTECTION BECAUSE IT DIDN'T HAVE A COPYRIGHT NOTICE,
25 IT WAS THE BAD OLD PRE-BURN CONVENTION DAYS WHERE IF YOU DIDN'T

12:23PM 1 HAVE THE NOTICE, YOU DIDN'T OWN YOUR COPYRIGHT. AND THEY
12:23PM 2 BOOTSTRAPPED TO SAY THE LATER REGISTRATION CAN'T BOOTSTRAP
12:24PM 3 UNPROTECTED MATERIAL IN.

12:24PM 4 BUT WE ARE NOT DOING THAT, WE ARE NOT BOOTSTRAPPING
12:24PM 5 ANYTHING. WE ARE SAYING HERE'S OUR CODE, IT INCORPORATES OUR
12:24PM 6 PRIOR CODE, ALL OF OUR PRIOR CODE WAS COPYRIGHTED, IT WAS ALL
12:24PM 7 ORIGINAL TO US AND CAN YOU EXERCISE YOUR DISCRETION IN FAVOR OF
12:24PM 8 PRESUMPTION ON THE 198. BUT MOREOVER, WE PUT IN ACTUAL
12:24PM 9 EVIDENCE ON THE 198.

12:24PM 10 I RESPECTFULLY REFER YOU TO PAGES 9 AND 10 OF OUR
12:24PM 11 OPPOSITION TO ARISTA'S MOTION, AS TO 45 EXAMPLES THEY CONCEDE
12:24PM 12 WE HAVE PUT IN CONTRARY EVIDENCE OF ORIGINALITY. BUT THE MAIN
12:24PM 13 POINT, YOUR HONOR, IS AS YOU SAID.

12:24PM 14 THE COURT: WHAT ABOUT THE OTHER 153.

12:24PM 15 MS. SULLIVAN: WE ARE ENTITLED TO REST ON OUR
12:24PM 16 EVIDENCE OF OUR PROCESS.

12:24PM 17 WE HAVE PUT IN AMPLE EVIDENCE THAT OUR PRESS IS SUBJECTIVE
12:24PM 18 AND CREATIVE NOT ONLY HAS ARISTA NOT REFUTED THAT, THEY HAVEN'T
12:24PM 19 PUT IN ANY CONTRARY EVIDENCE THAT ANYONE INVENTED -- INVENTED
12:24PM 20 OUR COMMANDS IN CLI BEFORE.

12:24PM 21 YOUR HONOR, I THINK YOU CAN SEE FROM TODAY, IT WOULD BE
12:25PM 22 LUDICROUS TO LET ORIGINALITY, WHICH IS A THIN THRESHOLD ISSUE.
12:25PM 23 GO TO THE JURY. WE WILL SPEND DAYS OF VALUABLE JURY TIME GOING
12:25PM 24 OVER WHAT YEAR, WHAT REGISTRATION CONTAINED WHAT CODE.

12:25PM 25 WE DON'T WANT TO WASTE THE JURY'S TIME. ORIGINALITY IS A

12:25PM 1 LAY DOWN FOR CISCO. I RESPECTFULLY SUBMIT.

12:25PM 2 ONCE YOU HAVE DECIDED THAT, YOUR HONOR, PROTECTABILITY IN
12:25PM 3 THE SENSE THAT MY FRIEND WAS REFERRING TO, IT REMAINS FOR THE
12:25PM 4 JURY. HE CITES THE SATAVA CASE, THAT WAS ABOUT JELLY FISH
12:25PM 5 SCULPTURES IN A JAR, AS YOU WELL KNOW. THE ISSUE THERE WASN'T
12:25PM 6 IF OUR CLI IS IN OUR REGISTRATION, THE ISSUE THERE WAS CAN A
12:25PM 7 JELLY FISH TENTACLE, WHICH COMES FROM NATURE, BE PART OF MY
12:25PM 8 ORIGINAL JELLY FISH SCULPTURE. THAT'S PROTECTABILITY. AS TO
12:25PM 9 WHETHER SOMETHING IS IN THE PUBLIC DOMAIN. WE WILL LET THE
12:25PM 10 JURY DO THAT, BUT THAT DOESN'T AFFECT ORIGINALITY.

12:25PM 11 CISCO INVENTED CLI. EVERYBODY CALLS IT THE CISCO CLI.
12:25PM 12 IT'S BEEN AROUND FOR 30 YEARS, SO PROMINENTLY ASSOCIATED WITH
12:26PM 13 CISCO THAT MY FRIENDS LIKE TO CALL IT THE INDUSTRY STANDARD.
12:26PM 14 IT WAS OUR ORIGINAL CLI THAT SHOULDN'T BE SOMETHING THAT
12:26PM 15 DETAINS JURY TIME. SO I THINK YOU CAN, WITH RESPECT, CAN ISSUE
12:26PM 16 THAT RULING.

12:26PM 17 AS TO COPYING YOUR HONOR, WE UNDERSTAND VERY MUCH THE DUE
12:26PM 18 PROCESS CONCERN YOU RAISE. WHAT WE SUGGEST AS A PROCESS GOING
12:26PM 19 FORWARD IS THAT WE WILL DRAFT AN ORDER FOR YOU. WE WILL CREATE
12:26PM 20 AN EXHIBIT THAT MATCHES FOR EACH COMPONENT, THE VERBATIM CISCO
12:26PM 21 MULTI-WORD COMMAND EXPRESSIONS AND OTHER COMPONENTS THAT WERE
12:26PM 22 VERBATIM COPIED BY ARISTA.

12:26PM 23 IT WON'T TAKE YOU EXTENSIVE REVIEWS BECAUSE WE WILL MAKE
12:26PM 24 COLUMNS SHOW THAT THERE WAS VERBATIM COPYING, AND YOU CAN
12:26PM 25 SIMPLY ISSUE AN ORDER THAT AS TO THOSE VERBATIM COPY THINGS,

12:26PM 1 COPYING HAS BEEN ESTABLISHED. PROTECTABILITY REMAINS, BUT
12:26PM 2 COPYING HAS BEEN ESTABLISHED.

12:26PM 3 THE COURT: THAT'S WHAT IT WOULD REQUIRE. I DON'T
12:26PM 4 KNOW UPON RECEIVING SUCH AN ORDER, I DON'T KNOW WHAT ARISTA
12:26PM 5 WOULD WANT IN RESPONSE.

12:26PM 6 MR. VAN NEST: A FULL OPPOSITION, YOUR HONOR.

12:26PM 7 THE COURT: BECAUSE THAT WAS NOT BRIEFED, IT WASN'T
12:27PM 8 BRIEFED THAT WAY.

12:27PM 9 MR. VAN NEST: OBVIOUSLY.

12:27PM 10 MS. SULLIVAN: WELL, YOUR HONOR, I'M RESPONDING TO
12:27PM 11 THE CONCERN YOUR HONOR RAISED DURING ARGUMENT.

12:27PM 12 THE COURT: YES.

12:27PM 13 MS. SULLIVAN: AND AS TO NOTICE THAT WE WERE ONLY
12:27PM 14 ARGUING ABOUT COPYING, NOT COPYRIGHT INFRINGEMENT, I THINK WE
12:27PM 15 HAVE BEEN VERY CLEAR, THE PAPERS ARE VERY CLEAR WE WERE ARGUING
12:27PM 16 ONLY ON COPYING, AND COPYING -- BY COPYING, WE MEANT VERBATIM.

12:27PM 17 WOULD IT BE ACCEPTABLE, YOUR HONOR, WITH AN OPPORTUNITY FOR
12:27PM 18 OPPOSITION, FOR US TO GIVE YOU THE LIST?

12:27PM 19 THE COURT: WELL, I CERTAINLY WOULD LIKE TO SEE THE
12:27PM 20 LIST. AND AM I ULTIMATELY WILL HAVE TO WORK WITH THE LIST
12:27PM 21 BECAUSE THIS ISSUE WON'T GO AWAY.

12:27PM 22 SO I THINK IT'S -- SO THIS WOULD BE ITEM BY ITEM THAT YOU
12:27PM 23 ARE SEEKING JUDGMENT ON AS HAVING BEEN VERBATIM COPIED.

12:27PM 24 MS. SULLIVAN: YES, YOUR HONOR.

12:27PM 25 THE COURT: OKAY. WELL, THAT'S HELPFUL BECAUSE THEN

12:27PM 1 THE BOX IS FULL.

12:27PM 2 I DO THINK THAT THERE NEEDS TO BE THE OPPORTUNITY FOR
12:27PM 3 ARISTA TO RESPOND. I DON'T KNOW HOW QUICKLY YOUR -- YOU CAN
12:27PM 4 PUT TOGETHER SUCH A LIST.

12:27PM 5 MR. PAK: YOUR HONOR, WE SHOULD BE ABLE TO DO IT BY
12:28PM 6 END OF NEXT PEEK. THAT WOULD WORK WITH YOUR HONOR'S SCHEDULE.

12:28PM 7 AND WHAT WE ENVISION, LITERALLY, IS A TABLE AND IT WOULD BE
12:28PM 8 A FAIRLY LENGTHY TABLE, BUT IT WOULD BE LITERALLY VERBATIM
12:28PM 9 EXCERPTS OF THINGS THAT CISCO COPYRIGHTED ON THE LEFT-HAND
12:28PM 10 SIDE, AND ON THE RIGHT-HAND WOULD BE LITERALLY THE VERBATIM
12:28PM 11 COPY WITH CITATIONS IN THE RECORD TO SHOW THAT THESE EXACT
12:28PM 12 WORDS FROM THE DIFFERENT ELEMENTS OF THE CLI INTERFACE THAT
12:28PM 13 MS. SULLIVAN TALKED ABOUT, WHETHER IT'S COMMANDS, OUTPUT
12:28PM 14 STREAMS DOCUMENTATION, WERE LITERALLY COPIED OVER AND YOU CAN
12:28PM 15 SEE THE EXACT COMPARISON.

12:28PM 16 SO THERE'S NO NEED FOR YOU AND YOUR TEAM OF CLERKS TO GO
12:28PM 17 BACK TO THE RECORD. IT WOULD BE SIMPLY THESE ARE THE THINGS WE
12:28PM 18 ARE ALLEGING ARE VERBATIM COPIED, YOU CAN SEE IT FROM THE TABLE
12:28PM 19 ITSELF, AND I THINK WE REQUEST GET THAT DONE BY NEXT WEEK,
12:28PM 20 YOUR HONOR.

12:28PM 21 THE COURT: WELL, BECAUSE I HAVE TO ULTIMATELY DECIDE
12:28PM 22 THIS ISSUE, AND IF IT CAN BE DECIDED AT SUMMARY JUDGEMENT, EVEN
12:28PM 23 A FEW OF THEM, IT WILL ASSIST.

12:29PM 24 I'M WILLING TO ACCEPT THAT, BUT I CERTAINLY FEEL THAT
12:29PM 25 ARISTA SHOULD HAVE A FULL OPPORTUNITY TO RESPOND. AND SO IT'S

12:29PM 1 HARD TO KNOW HOW MUCH TIME YOU NEED TO RESPOND TO SOMETHING YOU
12:29PM 2 HAVEN'T SEEN.

12:29PM 3 MR. VAN NEST: WE WILL TRY.

12:29PM 4 MR. FERRALL: MR. PAK'S EXPLANATION, IT SOUNDS LIKE
12:29PM 5 IT MAY BE WELL OVER 100 PAGES, BUT MAYBE NOT.

12:29PM 6 MR. PAK: THERE WAS A LOT OF COPYING.

12:29PM 7 THE COURT: THERE ARE A LOT OF ITEMS, POTENTIALLY.

12:29PM 8 MR. PAK: YEAH.

12:29PM 9 MR. FERRALL: SO I THINK WE WOULD LIKE THE
12:29PM 10 OPPORTUNITY TO SEE THE LIST, AND IF I COULD SUGGEST ALSO, IT'S
12:29PM 11 NOT JUST THE LIST, I THINK WHAT WE WOULD LIKE CLARIFICATION ON
12:29PM 12 IS WHAT EXACTLY IS CISCO ASKING THE COURT TO DECLARE FROM THIS.
12:29PM 13 AND WE HAVE ARGUED ABOUT IT A LITTLE BIT. BUT IT'S -- IT
12:29PM 14 MATTERS, OBVIOUSLY.

12:29PM 15 THE COURT: WELL, I THINK WHAT I NEED TO DO IS TO
12:29PM 16 MOVE THIS ISSUE OFF MY TABLE RIGHT NOW BECAUSE I'M WORKING UP
12:30PM 17 AGAINST SOME TIME PRESSURE, AS YOU ALL ARE, AND TO TRY TO
12:30PM 18 DECIDE THESE OTHER ISSUES, WHICH MAYBE WON'T BE AS HARD, I WILL
12:30PM 19 ACCEPT THAT BY WEDNESDAY OF NEXT WEEK.

12:30PM 20 AND THEN I GUESS WHAT I WOULD LIKE FROM ARISTA BY THE NEXT
12:30PM 21 DAY IS A SUBMISSION ON WHAT YOU WOULD LIKE TO DO TO RESPOND AND
12:30PM 22 HOW MUCH TIME IT WOULD TAKE, NOT THE RESPONSE ITSELF, OF
12:30PM 23 COURSE.

12:30PM 24 MR. FERRALL: UNDERSTOOD.

12:30PM 25 THE COURT: BUT IF YOU COULD EVALUATE IT AND BE READY

12:30PM 1 TO TELL ME WHAT YOU NEED IN ORDER TO COMPLETE IT. AND I'M ON A
12:30PM 2 VERY, VERY TIGHT TIME FRAME. I'M NOT TALKING ABOUT WEEKS, BUT
12:30PM 3 HOPEFULLY DAYS, BUT YOU DON'T KNOW WHAT YOU ARE GETTING AND I
12:30PM 4 DON'T KNOW WHAT YOU ARE GETTING.

12:30PM 5 SO THAT'S WHAT I WOULD LIKE TO HEAR FROM YOU ON WHAT IT
12:30PM 6 WOULD TAKE TO RESPOND. IS THAT REASONABLE?

12:30PM 7 MR. FERRALL: I THINK SO.

12:30PM 8 MR. VAN NEST: IF WE GET IT CLOSE OF BUSINESS, WE
12:30PM 9 WILL RESPOND TO THE COURT CLOSE OF BUSINESS.

12:30PM 10 THE COURT: LET'S MAKE IT CLOSE OF BUSINESS, NOT
12:30PM 11 CLOSE OF DAY, THAT WOULD BE GREAT.

12:30PM 12 MS. SULLIVAN: UNDERSTOOD, YOUR HONOR. THANK YOU.

12:30PM 13 THE COURT: OKAY. NOW AS I SAID, I HAVE A HARD STOP.

12:31PM 14 I WANTED TO RAISE ONE OTHER MATTER WITH YOU, THAT'S MORE MY
12:31PM 15 PROBLEM THAN YOURS, BUT I HAVE A DISCLOSURE THAT I WOULD LIKE
12:31PM 16 TO MAKE AND I DON'T KNOW HOW YOU WILL FEEL ABOUT IT.

12:31PM 17 AS YOU KNOW, WE CHANGED LAW CLERKS THIS TIME OF YEAR AND SO
12:31PM 18 I HAVE NEW LAW CLERKS COMING IN. AND THE LAW CLERK I WOULD
12:31PM 19 HAVE ASSIGNED TO THIS CASE PREVIOUSLY WORKED AT QUINN EMANUEL,
12:31PM 20 AND THAT IS PATIENCE REN. AND SHE DID LEAVE THE FIRM MAYBE A
12:31PM 21 YEAR AGO TO GO TO ANOTHER LAW FIRM.

12:31PM 22 SHE ADVISES ME THAT SHE NEVER WORKED ON THIS CASE. SHE
12:31PM 23 ADVISES ME THAT SHE CERTAINLY KNOWS ATTORNEYS WELL WHO WORK ON
12:31PM 24 THIS CASE BUT THEY HAVE NEVER DISCUSSED THE CASE WITH HER.

12:31PM 25 UNDER THE RULES OF ETHICS FOR JUDICIAL EMPLOYEES, AN

12:31PM 1 ARGUMENT COULD BE MADE THAT SHE WOULD BE CONFLICTED OFF THE
12:31PM 2 CASE. AND SO I'M MAKING THIS DISCLOSURE, AND I WOULD NEED TO
12:31PM 3 KNOW WHETHER THERE IS ANY OBJECTION TO THE ASSIGNMENT OF THE
12:31PM 4 LAW CLERK THAT I WOULD NORMALLY HAVE ASSIGNED THIS CASE TO.

12:32PM 5 MR. VAN NEST: WE NEED TO CONSULT WITH OUR CLIENT ON
12:32PM 6 THAT, YOUR HONOR. WHAT IS HER NAME?

12:32PM 7 THE COURT: PATIENCE REN, R-E-N. AND SHE NOW WORKS
12:32PM 8 AT -- MAYBE SHE HAS ALREADY LEFT, BUT SHE MOVED ON TO A
12:32PM 9 DIFFERENT LAW FIRM ABOUT A YEAR AGO.

12:32PM 10 MR. VAN NEST: OKAY. IF WE COULD HAVE SOME TIME. WE
12:32PM 11 CAN RESPOND TOMORROW, BUT WE WILL RESPOND QUICKLY. I WOULD
12:32PM 12 LIKE TO CONSULT WITH THE CLIENT ON THAT.

12:32PM 13 THE COURT: AND THAT WOULD BE FINE, AND IF YOU COULD
12:32PM 14 REFERENCE IN YOUR RESPONSE, I MEAN, IF YOU FEEL THAT IT'S A
12:32PM 15 CONFLICT, THAT'S FINE, IF YOU FEEL THAT IT'S NOT, I WOULD LIKE
12:32PM 16 YOU TO REPRESENT THAT THIS IS COMES FROM YOUR CLIENT AS WELL.
12:32PM 17 BECAUSE I THINK THAT'S IMPORTANT.

12:32PM 18 MR. VAN NEST: THAT'S WHAT WE WILL DO, YES.

12:32PM 19 THE COURT: AND OF COURSE YOU NEED TO DISCUSS IT WITH
12:32PM 20 THEM.

12:32PM 21 MR. VAN NEST: RIGHT.

12:32PM 22 THE COURT: ALL RIGHT.

12:32PM 23 AND WELL, OF COURSE, YOU KNOW, I WILL JUST MAKE A DIFFERENT
12:32PM 24 ASSIGNMENT. BUT YOU ALL UNDERSTAND HOW OUR CHAMBERS WORKS. SO
12:32PM 25 THANK YOU FOR LOOKING INTO THAT.

12:32PM 1 MR. VAN NEST: YOU ARE WELCOME.

12:32PM 2 THANK YOU, YOUR HONOR.

12:32PM 3 MR. PAK: YOUR HONOR, ON MONDAY, WHAT TIME WOULD BE
12:32PM 4 BEST FOR YOU FOR US?

12:32PM 5 THE COURT: HOW MUCH TIME -- WELL, LET'S SEE, WE HAVE
12:32PM 6 A -- I HAVE A JURY THAT WILL BE DELIBERATING.

12:33PM 7 (OFF-THE-RECORD DISCUSSION.)

12:33PM 8 THE COURT: WELL, AND HOW MUCH TIME DO YOU THINK WE
12:33PM 9 NEED ON THIS?

12:33PM 10 MR. PAK: I THINK I WOULD NEED 20 TO 30 MINUTES.

12:33PM 11 MR. VAN NEST: NO MORE.

12:33PM 12 MR. SILBERT: I COULD DO IT IN MUCH LESS, BUT
12:33PM 13 OBVIOUSLY I WOULD LIKE EQUAL TIME.

12:33PM 14 THE COURT: THAT'S A LONG TIME. THEN WHY DON'T YOU
12:33PM 15 COME AT 2:30.

12:33PM 16 MR. PAK: YES.

12:33PM 17 THE COURT: AND THEN I WILL BE DONE WITH MY CASE
12:33PM 18 MANAGEMENT CONFERENCE. AND OF COURSE YOU UNDERSTAND THAT I'M
12:33PM 19 MANAGING A JURY. SO IT COULD BE DIFFICULT. BUT THE SOONER,
12:33PM 20 THE BETTER FOR ME.

12:33PM 21 TOMORROW I WILL BE TAKEN UP WITH CLOSING ARGUMENTS, SO I
12:33PM 22 CAN'T HAVE YOU COME BACK TOMORROW.

12:33PM 23 MR. SILBERT: AND YOUR HONOR, IF I COULD JUST CLARIFY
12:34PM 24 TO MAKE SURE WE ARE PREPARED, IT'S ONLY THE PATENT ISSUES?

12:34PM 25 THE COURT: THAT'S WHAT I'M TOLD; IS THAT CORRECT?

12:34PM 1 MR. SILBERT: YES.

12:34PM 2 MR. PAK: THAT'S CORRECT.

12:34PM 3 THE COURT: ONLY THE PATENT ISSUE. OKAY.

12:34PM 4 THANK YOU ALL.

12:34PM 5 MR. VAN NEST: THANK YOU FOR YOUR TIME, YOUR HONOR.

12:34PM 6 MS. SULLIVAN: THANK YOU VERY MUCH, YOUR HONOR.

12:34PM 7 (WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

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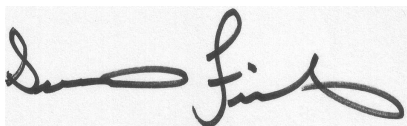
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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

A handwritten signature in black ink, appearing to read "Summer A. Fisher", is written over a light gray rectangular background.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

DATED: 8/8/16